THE LAW REPORTER.

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THE TRIAL OF ABNER BAKER.[1]

The document whose title-page we have quoted below at length, albeit a deplorable specimen of book-making, in which one is constantly getting bewildered in a maze of petitions, evidence, letters, speeches and certificates mixed up in the strangest confusion, discloses one of those revolting cases of judical ignorance and barbarity which fill us with horror and amazement. It is with feelings of unspeakable mortification and sorrow, that we find it reserved for the year of our Lord 1845, in the state of Kentucky, to present us, in the administration of the law, with a triumph of passion, revenge, ignorance and political faction over the pleadings of humanity and science, unparalleled, we venture to say, in the judicial history of our country. We shall not spend words upon the actors in this affair, for such persons would heed the strongest expressions of public indignation, as little as the wind. People who are addicted to such pungent arguments as bowie-knives and pistol-bullets, would scarcely feel the paper-pellets of the brain. As faithful journalists of matters connected with insanity, we could not overlook this case, while it will give those worthy people who mourn

[1] Life and Trial of Dr. Abner Baker, Jr. a monomaniac, who was executed October 3d, 1845, for the alleged murder of his brother-in-law, Daniel Bates; including Letters and Petitions for his pardon, and a narrative of the circumstances attending his execution, &c. &c. By C. W. Crozier. Trial and evidence, by A. R. M'Kee. Louisville, Ky. Prentice & Weissinger, printers: 1846.

over the prevalence of the plea of insanity in defence of crime, an opportunity to see the other side of the matter, and derive what consolation they can, from the sight of a wretched maniac proclaiming his wild delusions from the gibbet.

Dr. Baker, the accused in this case, was a practising physician in Clay county, Kentucky, of a well-known and respectable family, and at his decease, about 30 years of age. One of the editors of this publication states that as early as 1838 and 1839, he manifested some singularities of deportment that caused much speculation among his friends. Once, while attending the medical lectures, he suddenly and without the least provocation, began to abuse a fellow-student for looking at his head, — suspecting him of looking at a lock of white hair — and threatening to take his life if he did it again. He then resided with this editor, who also says — though neither of these facts appeared in evidence at the trial — that he would frequently alarm the family at a late hour in the night by crying out that some persons were in the house. We would light a candle, and followed by Dr. Baker, who was armed with the tongs, or shovel, would examine every apartment, even to the garret, and he would after this still insist that there were persons in the house, as he heard them whispering. We hear nothing more of his mental irregularities until within a year of the homicide, when some notions he expressed to his father respecting Bates's treatment of his wife, awakened in the latter's mind the suspicion which he had previously entertained, that his son was becoming deranged. This and the following facts respecting his mental condition, we find in the evidence given at the trial.

In May, 1844, he married a young girl of a wealthy and respectable family, herself of an unblemished character, and went to reside in the family of this James Bates, whose wife was a sister of Baker. From this time till the day of his execution, he was possessed with the idea that his wife was unchaste, — a subject indeed of *nymphomania*. On this point, he seems to have spoken very freely and with almost everybody, and among a multitude of persons whom he mentioned as having criminal intercourse with his young wife, at one time or another, was her teacher, her uncles, this brother-in-law Bates, and even negroes. He believed that she commenced this infamous conduct as early as her ninth or tenth year, and continued it at every opportunity subsequently. In regard to some of these persons, he declared that they came into his sleeping room at night, and accomplished their purpose, even in his own presence, and that on one occasion, whilst visiting his father's family, his own mother lent her assistance. He also imagined that his mother and

sisters kept a house of ill-fame, that Bates treated his own wife with great cruelty, and had debauched her younger sister, and that, in conjunction with his (Baker's) wife, he once attempted to poison him. He told a witness that they gave him some toddy, and though he took but a sip of it, yet "it swelled up his head until it felt as large as a bushel; and that if he had drank as much as usual, it would have blown him to hell in five minutes." He frequently expressed his belief that Bates was at the head of a conspiracy to kill him, and that for this purpose, he had collected muskets and other weapons in his house, and had set his negroes to waylay him in secluded places.

During the period between his marriage and the homicide, he manifested various symptoms of bodily ill-health. His brother, also a physician, testified that "his bowels were costive, stomach irritable, mucous membrane covering the mouth and fauces red and much swollen," and was "watchful and restless." Another witness stated that "his countenance had a haggard expression," and he "looked as if just recovering from a spell of sickness." He seems to have neglected his business, and taken but little interest in anything beyond the circle of his delusions. Finally, after one attempt in which he was defeated by the vigilance of Bates, he succeeded in shooting his victim, on the 13th of September, 1844. He made no attempt to escape, was quietly arrested, tried by a magistrate, and discharged on the ground of insanity. His brothers took him home with them and endeavoured to restore him to health, but not completely succeeding in this purpose, they concluded at the end of some three or four months, to send him to Cuba, for the benefit of change of air, scene, &c. While here, Governor Owsley of Kentucky issued a proclamation, in which Baker was described as a fugitive from justice, and a reward offered for his arrest. This immediately induced his family to get him home, and surrender him to the authorities of the state.

His trial began on the 7th of July, 1845, before Hon. Tunstel Quarles, judge of the 15th judicial district. Public feeling seems to have been much excited; the friends of the deceased, and of the prisoner respectively, made unusual efforts, the former to obtain his conviction, the latter his acquittal; armed men were observed in every part of the court room; and a long array of eminent counsel appeared on each side. A considerable number of witnesses were examined, to whom the largest liberty was allowed in giving their testimony, much of which was mere hearsay and rumor. Whether the courts of Kentucky ever pretend to be governed by any rules of evidence, is what we do not know; but in

this case, certainly, there was a complete defiance of all rules recognized in this part of the world, for the witnesses were permitted to ramble on pretty much as they pleased. The two following passages, each of which is a continuous extract, will give the reader some idea of what is considered evidence in Kentucky.

"Witness was at the Lunatic Asylum in Lexington, and saw the inmates, and did not then believe that a man could be deranged upon one subject and not upon all. Witness was told by Mrs. Dr. Reid, that Dr. Reid said that Dr. Baker was deranged, and had been in that condition for twelve months. Said damn his derangement. Witness had a conversation with Mr. Woodcock the clerk of Clay, and attorney Einsworth, and they said that the best ground of Abner Baker's defence was derangement, and witness said then that was a fashionable way of defence. Witness has since read upon the subject a little and heard some conversation, and now has no doubt that Abner Baker is a monomaniac.

"Witness told Baker that a neighbor woman had told his (witness's) wife, that Bates had said that if he (Baker) ever came down, he would kill him."

After this specimen, no one can be surprised that most of the witnesses, though not medical men, were allowed to express their *opinion* respecting Baker's mental condition, and the manner in which some of them expatiated on this point, is certainly curious if not very instructive. Two medical witnesses only were examined, one for the government, the other for the prisoner. The former, Dr. Reid, seems to have obtained some new light on the subject of insanity, which we feel bound to notice for the sake of professional gentlemen who might not otherwise receive its benefits. He states that "he had not expressed the opinion that Dr. B. was insane, but he has been of the opinion that Dr. B. was laboring under illusions of mind in regard to his wife." Again he says, that "a person who can lay all his plans for carrying out anything desired, to be accomplished, would not be laboring under insanity." This gentleman's answers seemed to be the mere echo of the questions put to him by either side, for he finally admitted that supposing the facts respecting Baker's extraordinary notions, as we have mentioned them above, to be true, he was unquestionably insane. Dr. Richardson of Lexington, who for many years had been a professor in the Transylvania University, was called by the other side, and though he had never been devoted expressly to the care of the insane, yet he appears to have seen somewhat more of it than most practitioners. He had visited Baker in jail, and heard the testimony at the trial, and could have no doubt that he was insane. His notion, however, that the position Baker sat in was strongly indicative of insanity, savors more of the fanciful than the scientific. But the evidence established beyond a doubt the existence of Baker's delusions, while it disclosed not a shadow of

foundation for them in the conduct of his wife or of Bates. Indeed there was no attempt to prove that their characters were otherwise than irreproachable, or that his delusions were not as baseless as the fabric of a vision.

All the counsel declined to furnish their speeches to the editor, except one who pleaded for the prisoner, so that we do not know on what ground they urged his conviction. Neither does the charge of the court to the jury appear, and therefore we are left in the dark as to the views of the court on the law of insanity. The jury were out two days, and it is not the least remarkable trait of this remarkable trial, that, "during a great part of the time," as the editor states, "a large body of influential men, most of them armed, stood in full view of the jury." It is not surprising that the result of *such* deliberations was the conviction of the prisoner. A motion was made for a new trial, but without success; sentence was pronounced, and a day appointed for the execution. Thus ended another act of this judicial tragedy. A sadder is to follow.

The friends of Baker now made every effort to procure his pardon. Six of the jury signed a paper recommending him to mercy — we say signed, though two of them made their mark, "like honest, plain-dealing men," — in which they say that Baker "was in a state of mental excitement and delusion respecting his wife and said Bates, which may be considered insanity." One of this number also certifies, among other things, that "from the evidence, they believed that Dr. Baker was deranged upon those subjects, and not a fit subject for example; but from our understanding of the law applied to the evidence, we had to find a verdict of guilty. I do farther certify," he continues, "that if the delusions which were proved upon Baker had been facts, it would have been a full and good excuse for killing him (Bates)."

Another certificate in which the same sentiments are expressed in the same words, are signed by four other jurymen.[1] Such a juxtaposition of the most latitudinarian indulgence to crime with the most servile obedience to the letter of the law, is without its like in all the annals of criminal jurisprudence within our knowledge. Applications for his pardon were made by hundreds of persons, comprising some of the most respectable and best known citizens in the state. The leading medical men in Kentucky, among

[1] These worthy gentlemen, in the course of their deliberation at the point of the bowie-knife, found something very like a mare's nest. "We do further certify," they say, "that we did not look upon the authorities which were read on the part of the defence, as law, which authorities, or some of them, were Beck's Medical Jurisprudence, Ray's Medical Jurisprudence, and other works."

whom were several professors in the Transylvania University, and Dr. Allan, the worthy superintendent of the Kentucky Lunatic Asylum, after examining the testimony given at the trial, declared their belief that he was deeply insane when he committed the homicide. The result of the movement was only to procure a reprieve of a few weeks, and he was finally executed on the 3d of Oct. 1845. Under the gallows he made a speech, rehearsing his delusions respecting his wife and Bates, and glorying in the bloody deed for which he suffered. Taking hold of the rope, he exclaimed with the bitterest feelings, "behold the necklace of a whore." Thus, under the sacred names of justice and law, was enacted a fearful tragedy that outraged both, and whose parallel can be found, we apprehend, only in the proceedings of the committee of public safety in Paris during the reign of terror.

Various incidents are recorded illustrative of the *animus* that presided over the whole progress of this case, a particular notice of which would be foreign to our purpose, but the part taken in it by one personage we can not pass over in silence. By a refinement of cruelty worthy of the inquisition, his family were not permitted by the jailor to visit him in jail, even at a moment when he was supposed to be dying from the effects of a wound he had inflicted upon himself for a suicidal purpose. This outrage was not considered sufficient without the addition of an insult. The father travelled fifty miles in search of the judge, to obtain from him the requisite permission to see his son. It was given with the qualification that the jailor might still do as he pleased about allowing an interview, and accordingly he pleased not to. The *governor* was then requested to give a letter of permission, which he did with the same qualification. The result was the same, and this stricken family had no opportunity of seeing the prisoner till he was led out for execution. And yet persons apparently friendly to Baker were allowed to frequent his prison, and "induce him to say or acknowledge things disadvantageous to himself, which would immediately be laid before the governor." Not satisfied with this, they stole his private papers.[1]

It is intimated that much of the zeal manifested by those who took an active part in the prosecution, was the offspring of political party spirit, and it is more than insinuated, that in the course taken

[1] It is stated, that the guard who were placed around the jail, would taunt and abuse him, and also, that "for sometime previous to the execution, his hands were tied behind him." In the name of humanity we ask, are such practices usual in Kentucky, or were they reserved as a sort of climax to the cruelty and indignity heaped upon this miserable maniac?

by Governor Owsley, he was the willing tool of the same clique that had used such audacious measures to procure Baker's conviction. The book certainly, furnishes strong prima facie evidence that he was actuated by improper motives, for his conduct can be explained on no just views of executive duty. There is no formal statement of his reasons for refusing to stay the course of judgment, but from the remarks of others it is to be inferred, that it was not because he disbelieved the fact of the prisoner's insanity, but because he doubted his right to interfere with what he regarded as the jurisdiction of the court. He knew, it seems, that by the common law, if a prisoner under sentence of death become insane, he should be respited until his reason is restored; but the respite, he thought, should proceed from the court; and the court, we suppose, thought it should emanate from the executive, and thus, in consequence of their ignorance of the full extent of their respective powers, a respite which the law allowed, was not granted at all, and an innocent man was executed. We suppose of course that the issue made by the governor was the true one; if it were otherwise, so much the worse for him. His position in regard to this case, is one, which no high-minded man will covet, for we see not how he can escape a large share of the infamy attached to the whole transaction. These are harsh words to apply to the governor of a state, but unless this book is a tissue of falsehoods and forgeries from beginning to end, we see not how any person can read it impartially, without participating in our conclusions. We speak more in sorrow than in anger. A proper pride of country would have induced us to bury in oblivion, if possible, a case indicative of a state of civilization more like that of the middle ages than of the nineteenth century. But an imperative sense of duty impels us to hold up its atrocities to the public view, in the hope that such exposure will convey an impressive and a salutary lesson. When a gross outrage is committed on the rights of humanity, we regard it as the duty of every honest man, when seasonable opportunity offers, to proclaim his disapprobation in tones that shall reach the wrong-doer even in his most secret refuge. In taking leave of this case, we would express the hope, that no similar one will ever be permitted again to disgrace our country and the age.

Recent American Decisions.

Supreme Judicial Court of Massachusetts, Norfolk County, October, 1846, *at Dedham.*

NATHAN JONES *v.* LEWIS RICHARDSON.

A. mortgaged to B. his stock in trade, to secure a bona fide debt, describing it in these words: "the whole stock in trade of said A., as well as each and every article of merchandise which said A. this day bought of W., as every other article constituting the said A.'s stock in trade, in the shape the same is and may become, in the usual course of the said A.'s trade and business as a trader." It was *held*, that nothing passed by the mortgage, except the stock in trade which the mortgagor had, at the time the mortgage was executed.

Such mortgage will not be held to be fraudulent, but will be held valid as to those goods which the mortgagor had at the time the mortgage was executed, in the absence of any proof of fraud.

Whether, where a party agrees to pledge property afterwards to be acquired, and when acquired delivers over the same to the pledgee, the right of the pledgee will then attach, — *quære.* But if so, the same doctrine does not apply to a mortgage or sale.

Whether, if the mortgagor had done any act, in relation to the subsequently acquired goods, by which he ratified the mortgage, he would have thus given the mortgagee a lien thereon, as against the mortgagor, — *quære.*

But, under the revised statute of Massachusetts, ch. 74, s. 5, a delivery of such subsequently acquired property by the mortgagor to the mortgagee, could not render the mortgage valid, as against subsequently attaching creditors, unless delivered with the intention to ratify the mortgage, and unless the mortgagee had retained open possession of the same until the time of such attachment. And whether such delivery and possession would be sufficient to render it valid, — *quære.*

THIS case came before the court upon the report of an arbitrator selected by the parties, with an agreement that he should, at the request of either party, state in explicit terms upon the face of his award, the exact evidence and facts, in respect whereof either of the parties should state or raise any legal objection or question, whether upon the admissibility or competency of any evidence or witness, or upon any question of law. The referee met the parties, by their counsel, and the plaintiff gave in evidence to support his demand, the following written instrument: "Norfolk, *ss.* Sept. 9, 1842. Received of Nathan Jones, a deputy sheriff for the county of Norfolk, the personal property contained in the schedule hereafter written, which were this day attached by said Jones, as the property of Addison Richardson, at

the suit of E. Wassen, Henry Pierce, Rufus Clements, and on several other writs, against said Richardson and others; the writs being returnable at the next court of common pleas, at Boston, in the county of Suffolk, on the first Tuesday of October next; and having received of said Jones one dollar in full for my services, I do promise to keep said goods safely, and deliver the same to said Jones in good order on demand. Schedule. The whole of the remainder of said Richardson's stock in trade now in said Lewis Richardson's house, consisting of broadcloths, other woollen goods, cotton goods, crockery ware, hard ware, silk goods, and all other goods of every description which were removed to my place by said Addison Richardson. Said goods are contained in several boxes, except the crockery ware, estimated at the value of fifteen hundred dollars. Lewis Richardson."

The plaintiff also gave evidence, and it was admitted by the defendant, that he demanded a delivery by the defendant of the above mentioned goods, in the month of June, 1843, and that the defendant refused to deliver them. The defendant offered to prove, and the plaintiff admitted, that when this action was commenced, the suits on which the goods were attached were not disposed of, but were pending in court, and the defendant thereupon objected, that this action was prematurely brought, and could not be maintained. The arbitrator deemed this objection groundless.

The defendant then gave in evidence a mortgage to him, which was recorded by the clerk of the town of Medway, on the 7th of September, 1842, which mortgage bore date the 7th of October, 1840, and by which Addison Richardson mortgaged to the defendant, to secure a note of the same date for two thousand dollars and interest, "the whole stock in trade of said Addison, as well as each and every article of merchandise, which the said Addison this day bought of Timothy Walker, being in a store formerly kept by said Walker, in said Medway, as every other article constituting the said Addison's stock in trade, in the shape the same is and may become in the usual course of the said Addison's trade and business as a trader."

It was stated by the plaintiff and admitted by the defendant, that the goods which were the subject of this reference, were formerly the stock in trade of said Addison Richardson, but that only a part of them was owned by him until after he made this mortgage. The plaintiff did not deny that the note of two thousand dollars, mentioned in said mortgage, was justly due from Addison Richardson to the said Lewis, and was wholly unpaid. But the plaintiff insisted that the mortgage was on the face of it fraudulent

and wholly void as against other creditors of said Addison, or if not wholly void, that it was void as to all the goods which were not a part of Addison's stock in trade when the mortgage was executed. The defendant thereupon offered to introduce evidence that he had taken possession of all the goods which are the subject of the reference, before they were attached by the plaintiff for the purpose of foreclosing the mortgage. But the arbitrator deeming such evidence irrelevant, refused to receive it. He also was of opinion that the mortgage was valid, as to all the goods which were attached by the plaintiff. The defendant then proposed to give evidence that the true value of the goods which were attached, was much less than fifteen hundred dollars; but the arbitrator being of opinion that the defendant was answerable to the plaintiff if at all, for the sum at which the goods were estimated in the defendant's receipt, refused to receive such evidence.

The defendant next insisted that by the true construction of the defendant's receipt, taken in connection with the mortgage, the plaintiff attached only so much of the mortgaged property as should be found to remain after payment therefrom of the debt for which it was mortgaged, to wit, the mortgagor's right in equity to redeem the property. But the arbitrator was of opinion, that the plaintiff neither did nor could make such an attachment, and that the whole property in the goods was attached by him and was included in the receipt given to him by the defendant. The defendant then gave in evidence a written demand, delivered by him to the plaintiff, after the attachment was made and the receipt given, but on the same day. It was admitted by the plaintiff that he had paid nothing to the defendant after this demand, but he denied that the demand and his omission to pay anything to the defendant, were sufficient in law to dissolve the attachment. The arbitrator was of opinion that the defendant was entitled by law to defend this action under his mortgage, and that the demand made on the plaintiff by the defendant was good and sufficient, at least for the sum of two thousand dollars, which exceeded the value of the goods attached as estimated by the parties. The arbitrator therefore, on the foregoing statement was of opinion, and accordingly awarded, subject to the opinion of the court, that the plaintiff had no cause of action against the defendant, and that the defendant recover of the plaintiff costs of court to be taxed by the court, and also the costs of reference.

George M. Brown, for the plaintiff, contended, 1. That the mort-

gage was not valid to embrace the property in question. No property passed except the property of the mortgagor at the time. It was fraudulent on the face of it, or a jury would be bound to infer it. *Robbins* v. *Parker*, (2 Met. 258,) 3 Met. 515, 17 Wend. 492; 2 do. 596. But be this as it may, the mortgagee had no title to after purchased goods. (4 Met. 306; 14 Pick. 497; 2 Story, 637; 21 Maine, 86; 2 Mees. & Wel. 610, 617; 5 M. & G. 235; 6 Scott, 967.) 2. The demand was not sufficient, (1 Met. 172; 23 Pick. 321; 3 Met. 144.) 3. The valuation in the receipt was conclusive.

J. Richardson, and *W. Lovering*, for the defendant. No question of fraud was raised before the referee. Estimation not conclusive. Mortgage good. *Macomber* v. *Parker*, (14 Pick. 497; 20 Maine, 408.) Demand good, (1 Met. 172; 3 Met. 145; 2 Story 555; 2 Story's Eq. sec. 1224, 1411; 1 Hill 108.) If not a mortgage it is a good pledge. The defendant offered to prove that he had taken possession. *Lunn* v. *Thornton*, (1 M. & S.; 6 Man. & Gr. 245.)

WILDE, J., delivered the opinion of the court. This case at a former term was referred to the determination of an arbitrator, who was required, at the request of either party, to state the evidence and facts, in respect whereof either of the parties should think fit to raise any legal question. In pursuance of this reference, a hearing of the parties has been had before the arbitrator, and the case comes before us on his report. At the hearing it appeared in evidence, that the plaintiff claimed the property in question between the parties, by virtue of an attachment thereof, as the property of one Addison Richardson, and that the defendant claimed the same under a mortgage to him from the said Addison Richardson, made and recorded, before the said attachment; and the principal question submitted to the court by the arbitrator is, whether the said mortgage is valid against the creditors of the mortgagor.

The property mortgaged is thus described in the deed. "The whole stock in trade of said Addison, as well as each and every article of merchandise which the said Addison this day bought of Timothy Walker, as every other article constituting the said Addison's stock in trade, in the shape the same is and *may become* in the usual course of the said Addison's trade and business as a trader." It was admitted that the goods in question were, at the

time of the attachment, the stock in trade of the said Addison, but that only a part of them was owned by him until after he made the said mortgage.

It has been contended by the plaintiff's counsel, that the mortgage was in law fraudulent and void against bona fide attaching creditors; or if not wholly void, that it was void as to all the goods which were not a part of the mortgagor's stock in trade when the mortgage was executed. There seems to us to be no ground for the argument, that this mortgage was wholly void, as being fraudulent on the face of it, or as having been made with an intent to defraud the creditors of the mortgagor. It was not denied that the mortgage was given to secure a large debt due from the mortgagor to the mortgagee, and no evidence was introduced at the hearing tending to prove that the mortgage was not made bona fide. The question therefore is reduced to this, namely, whether the defendant has acquired any valid title under the mortgage to the goods purchased by the mortgagors subsequently to the mortgage.

That a person cannot grant or mortgage property, of which he is not possessed, and to which he has no title, is a maxim of the law too plain to need illustration, and which is fully supported by all the authorities. Perkins says, "It is a common learning in the law, that a man cannot grant or charge that which he hath not." (2 Bac. Grant D a.; Grant, 665; Com. Dig. Grant D a.) It is true, a person may grant personal property of which he is potentially, though not actually possessed. A man may therefore grant all the wool that shall grow on his sheep which he owns at the time of the grant, but not the wool which shall grow on sheep not his, but which he afterwards may buy. So, a parson of a church may grant his tithes for years, although they are not actually in him at the time, yet they are potentially. And the same exception to the general rule extends to grants of growing crops, on lands of the grantors, at the time of the grants. *Lunn* v. *Thornton*, (1 Mann. Scott, 382, and the authorities there cited.) Not denying these principles, the defendant's counsel contend, that although the mortgagor could not convey or create a charge on property to which he had no title, nor possession, actual or potential; yet when he, after the mortgage, added to his stock in trade, by new purchases, the property vested immediately in the mortgagee, without any other act or conveyance on the part of the mortgagor, by virtue of the previous agreement to that effect contained in the mortgage deed. One of the cases cited in support of this argu-

ment, is the case of *Mitchell* v. *Winslow et al.* (2 Story's Rep. 613.) But that case was decided on principles of equity, and on the construction of the bankrupt act of 1841, ch. 9, on which it was held "that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and consequently, that they were affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests." "It is material here to state," says the learned judge, in giving his opinion, "that the present is not a controversy between a first and second mortgagee as to property acquired and *in esse* after the execution of the *first mortgage*, and before the execution of the *second mortgage*, both the mortgagees being purchasers for a valuable consideration. That might, at law, present a very different question." The decision, therefore, in that case, is of no authority in favor of the defendant in the present case, but seems rather to be an authority impliedly in favor of the plaintiff, who claims under an attachment by a bona fide creditor of Addison Richardson, the mortgagor.

The same remark may be made as to the case of *Fletcher et al.* v. *Morey*, (2 Story's Rep. 555.) That was a case in equity, in which the plaintiffs relied on an equitable lien, on certain shipments, and the proceeds thereof, in the hands of the defendant, the assignee of James Read & Co., as collateral security for advances made to them by the plaintiffs. And this lien was adjudged valid as an equitable charge on the property constituting a trust. But these decisions have but little bearing on the question under consideration. Many things are held to be assignable by courts of equity, which are not so held by courts of law. So the legal distinctions between executory and executed contracts are in many cases disregarded by courts of equity. But this case is to be decided according to the principles of the common law. The question is, what are the legal rights of the respective parties to the property in question?

One of the principal cases relied on by the defendants is that of *Macomber et al.* v. *Parker*, (14 Pick. 497.) In that case it appeared that Hunting & Lewis were lessees of a brick-yard, and entered into a contract with one Evans to make for them a certain number of bricks on certain terms, and to share the profit and loss between them, one half each; Evans agreeing that Hunting & Lewis should have full powers to retain Evans's part of the brick or money, to the amount of all sums of money due, or which might

become due from him to them. Hunting & Lewis afterwards assigned all their property, including the brick-yard, and their rights under the contract with Evans, to the plaintiffs, to which Evans assented, and agreed to act as agent for the assignees. This unquestionably was a good assignment upon the principles already stated. Hunting & Lewis not only had a potential possession, but they owned the clay, of which the bricks were to be made, subject only to the right which Evans might afterwards acquire by his contract. The transmutation of the clay into bricks did not change the right of property; so that Evans could not acquire an absolute legal title to his share of the bricks, until he paid the balance due to the plaintiffs. Upon this view of the case, the question, as to the right which might be acquired, by the pledging or hypothecation of property, was not material to the decision of the case. But if it were otherwise, the doctrine laid down by the learned judge who delivered the opinion of the court in that case, is not applicable to the present case. For if when a party agrees to pledge property afterwards to be acquired, and when acquired delivers over the same to the pledgee, the right of the pledgee would then attach, it does not follow that the same doctrine would apply to a mortgage or sale. A mortgage is an executed contract, and it is clear that nothing passed by the mortgage deed in this case, except the stock in trade which the mortgagor had, at the time the mortgage was executed. But in *Abbott* v. *Goodwin*, (20 Maine, 408,) it was held, that where certain goods were mortgaged, and the mortgagor afterwards exchanged some of the goods mortgaged for other goods, the mortgagee thereby acquired a title to the goods taken in exchange. And the case of *Macomber et al.* v. *Parker*, is cited by the learned judge who delivered the opinion of the court, as a strong case in support of this decision, without noticing the distinction between the two cases.

We cannot, however, concur in the principles upon which the case of *Abbott* v. *Goodwin* was decided. It was laid down in that case, "that all persons coming in under the mortgagor, stand by substitution in his place, equally affected by the contract, whether notified of its existence or not."

But the defendant in the case had attached the property, as the property of the mortgagor, and though he claimed under him, he might show that the mortgage and the exchange of property, were void as to the creditors of the mortgagor, though they might be valid against him, by way of estoppel or otherwise. And this case seems to be impliedly though not expressly overruled, by the case

of *Goodenow* v. *Dunn*, (21 Maine, 86.) And we fully concur with C. J. Whitman in the principles laid down by him in deciding the latter case. In the former case, the mortgage deed had no reference to any property afterwards to be acquired by the mortgagor; and the case seems to have been decided on the assumed fact that the property mortgaged was afterwards exchanged for the property in dispute with the assent of the mortgagee, but it does not appear, that the exchange was made with his assent, or that there was any agreement to this between the mortgagor and the mortgagee. In the case of *Tapfield* v. *Hilman et al.* (6 Mann. & Gr. 245,) the construction and legal effect of a similar mortgage were considered, and it was decided, that the mortgagee had no title to any property acquired by the mortgagor subsequently to the date of the mortgage. There was a clause in the mortgage, giving power to the mortgagee, upon nonpayment of the debt, to enter into the mortgaged premises, and "to take, possess, hold, and enjoy all the goods, chattels, effects, and premises." And it was held that the mortgagee had no right to take any property but what was on the mortgaged premises at the date of the mortgage. It was, however, said by Tindal, C. J., that it would have been otherwise, if power had been given to enter upon default, and to take the goods and effects then in and upon the premises. This would have been a good defence in that action if the mortgage contained such a power unquestionably, for it was an action of trespass by the mortgagor against the mortgagees. But although the mortgagees, with such a power, would be justified in seizing the goods of the mortgagor purchased by him subsequently to the date of the mortgage, it would not vest the property in the mortgagee. And so it was decided in the case of *Lunn* v. *Thornton*, (1 Mann. Gr. & Scott, 379,) which afterwards came before the same court. The plaintiff in that case had a bill of sale from the defendant "of all his goods, household furniture, stock, and implements of trade, and all other effects whatsoever, then remaining and being, or which should at any time thereafter remain in and about his dwelling-house, &c." And it was held that future acquired property would not pass by such a conveyance, unless the grantor should ratify the grant, after he had acquired the property therein. The counsel for the defendant relied, among other authorities, on one of Bacon's maxims, (Reg. 14.) "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum intervenienti novo actu." (4 Bacon's Works, 53.) A strong case in support of the rule is cited from the Year Books, (21 Eliz.) "If I

mortgage land, and after covenant with J. S., in consideration of money which I receive of him, that after I have entered for the condition broken, I will stand seised to the use of the same J. S., and I enter, and this deed is enrolled, and all within the six months, yet nothing passeth, because the enrollment is no new act, but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in that case, because of the vehement relation which the enrollment hath to the time of the bargain and sale, at what time he had nothing but a naked possession." (4 Bacon's Works, 55.) It was contended on the part of the plaintiff in that case, that the bringing of the goods on the plaintiff's premises, where they were seized after the execution of the bill of sale, was the new act done by the plaintiff which gave the declaration contained in the previous bill of sale, its effect. But the court held clearly that it could have no such effect. "The new act," Lord Tindal says, "which Bacon relies upon, appears, in the instances which he puts, to be an act done by the grantor, for the avowed object and with the view of carrying the former grant or disposition into effect." This decision, which appears to us to be founded on well-established principles, is decisive against the defendant's claim as to the property purchased by the mortgagor after the mortgage. He did not prove or offer to prove, any act done by the mortgagor, after the mortgage deed was executed, by which he ratified the same, as to the subsequently acquired property. All he offered to prove was that he had taken possession of the goods before the attachment. But this evidently was irrelevant, as it was held to be by the arbitrator. But if he had proved that the mortgagor had delivered possession to him of the goods in question, to hold the same under the mortgage, that would not avail him against the plaintiff, although it might, according to the case last cited, be good against the mortgagor. By the revised statutes, ch. 74, § 5, it is provided that "no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides."

Now it is clear, we think, that the record of the mortgage deed is no sufficient notice of a legal incumbrance as to subsequently acquired property, because by law no such property could be sold or conveyed thereby; and it furnished no notice that any property would be afterwards purchased, or if purchased, that any act

would be done to ratify the grant in that respect. As to such property, therefore, the mortgage could not be valid, except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee, with the intention to ratify the mortgage, and the mortgagee had retained open possession of the same until the time of the attachment. Whether such proof would be sufficient against creditors it is not necessary to decide, as according to the report of the arbitrator no such question has been raised.

As to the other questions raised, we think the decisions of the arbitrator were correct, and that upon the whole matter the plaintiff is entitled to recover the estimated value of the goods in question which were not the property of the mortgagor when the mortgage was executed, and no more. The case therefore is to be recommitted to the arbitrator, to ascertain what goods were mortgaged, unless the parties should agree as to this matter.

Supreme Judicial Court, Massachusetts, November, 1846, *at Boston.*

LINDA *v.* HUDSON.

Where A., a slave from Georgia, when in Massachusetts with her master, states, in casual conversation with B., a colored man, that she is a slave, and would like to be free, but is afraid or unwilling to take her freedom, and B. repeats the conversation to C., and C. calls at her master's house to see her, and is by her master refused permission, these facts are not sufficient to justify C. in applying for a writ of *habeas corpus* for the purpose of setting A. at liberty, and she may recover damages of C. for any injury that resulted to her in consequence of his acts.

THIS was an action on the case, brought by a colored woman, a slave in Georgia, to recover damages for personal injuries and annoyance, caused by the defendant, in procuring her to be arrested under a writ of *habeas corpus*. This was the second trial of the case. On behalf of the defence, evidence was offered tending to show that the plaintiff, at Springfield, had said to one Ruggles, who declared himself to be a fugitive slave, that she was a slave, and would like to be free, but that he had seen her again at Northampton, and she was somewhat shy, and afraid, or unwilling, to take her freedom. It was in evidence that Ruggles informed the defendant of this, and he then procured a petition for a writ of *habeas corpus* to be filled out, and followed the

plaintiff, who had left town, to Northampton. He there applied to a magistrate, Mr. Justice Dewey, of the supreme judicial court, to issue the writ, and offered to make oath to a petition for it. Ruggles was present, and informed the judge of his conversation with the plaintiff. The judge refused the writ, unless he should have evidence that the plaintiff wished to procure her freedom, or was precluded from making her wishes known. Hudson then repaired to the hotel at Northampton, and demanded to see the plaintiff. This was refused by Mr. Hodgson, her master. The defendant then returned to the judge, and upon this the judge granted the writ. On this the plaintiff was arrested and brought before him.

On behalf of the plaintiff it was proved, that the sheriff made the arrest against her remonstrances and refusal to go with him, and that on examination before the judge she declared the whole thing to have been done without her knowledge or consent, and that she knew she was free in Massachusetts. Upon this the writ was dismissed. On a former trial it did not appear that Ruggles had stated to the judge that the plaintiff had said to him that she wanted to be free, but was afraid or unwilling to be so. All this was, however, sworn to on the second trial.

Fletcher Webster, for the plaintiff.

Wendell Phillips, who appeared under a special power of attorney, having renounced his oath as a counsellor and attorney of the court, and *A. C. Spooner*, were for the defence.

After the closing argument for the defence, and before the counsel for the plaintiff had concluded,

Wilde, J., before whom the case was tried, interposed, and said that he should rule, that if all the facts offered in defence were true, they would not amount to probable cause, sufficient to justify the defendant, and that if the counsel would agree, he would so rule at once, and the plaintiff might go to the jury merely on the question of damages, reserving the question of law for the full bench. This was agreed to. His honor charged the jury, in substance, that the facts, if all admitted, would not justify the defendant; that the fact that one was a slave in another state, and would be held to servitude on returning there, was not sufficient to justify a stranger in procuring a writ of *habeas corpus* on his behalf; that a writ of *habeas corpus*, though a

writ of right, was still in the discretion of the judge to grant; and if it appeared, from the statement of the petitioner, that the person for whom the writ was sought, would be necessarily remanded after examination, it would not be granted. In the present case Mr. Justice Dewey had followed an entirely correct course; it was in his discretion to grant or withhold it; and while it was perfectly correct in him to issue it, and the sheriff to serve it, acting in their judicial and executive offices, the responsibility of the defendant in procuring it was not discharged. If it appeared that the statement he had made was true, and the plaintiff had availed herself of his interference, he would be justified, — probable cause would be proved by the event; or, if she had requested his interference and assistance, she could not afterward disclaim her request, and recover against him for any damages. But if otherwise, and she had not desired or requested his interference, he would be liable. He acted on his own hazard, and must take the consequences. The statement by her to the colored man, in casual conversation, that she was a slave and would like to be free, accompanied or followed by expressions of unwillingness or apprehension to take her liberty, was not sufficient authority to him to proceed. Thus qualified it could not be considered as a request. The defendant, therefore, proceeding without her request, did so at his own hazard, and was liable for any injury that resulted to the party in consequence of his acts.

Under this ruling and charge, the jury returned a verdict for the plaintiff, of $30 67.

Court of Oyer and Terminer, October, 1846, at New York.

MATTER OF GEORGE KIRK.

The right to reclaim a fugitive slave must not be exercised except by due process of law, and never with force and arms.

A master of a vessel, on board of which a slave escapes from Georgia to New York, will not be considered, in the courts of New York, as the agent of the owner of the slave, and thus authorized to detain and carry back such slave to Georgia, in the absence of any express authority, notwithstanding any implication of such authority from the laws of Georgia.

The laws of Georgia, which provide that any person may apprehend a fugitive slave, and return him to his master, cannot operate beyond the territory of Georgia.

Where a master of a vessel returns, upon a writ of *habeas corpus*, that the person detained in custody by him is a slave, who has concealed himself on board the vessel, and is there confined, without averring that he holds him for the purpose of bringing him before the mayor, pursuant to the Revised Statutes of New York, ch. 659, § 151, the court will not presume that he held the slave for the purpose of so bringing him before the mayor.

In a case involving personal liberty, where the fact is left in such obscurity that it can be helped out only by intendment, that intendment shall be in favor of the prisoner.

This was a case of *habeas corpus*, which came up under the following circumstances. The boy Kirk was a slave, owned in Savannah, in Georgia. He secreted himself on board of a vessel bound to New York; and was not discovered until the vessel had either arrived at or near the port of New York. The captain, upon making the discovery, put him in chains, and confined him in the hold, with the intention of taking him back to Savannah. A writ of *habeas corpus* was procured, on which a return was made, and a hearing was had, on the 26th of October, in the court of oyer and terminer, before Judge Edmonds and Aldermen Jackson and Johnson. The next morning the decision of the court was pronounced by

Edmonds, J., declaring the opinion of a majority of the court. By the United States constitution, art. 4, § 1, a fugitive from service can be claimed only by the party to whom the service is due. By the act of 1793, (1 Story, Laws of United States, 285,) in case of the escape of a person held to labor, the person to whom such service may be due, his agent or attorney, is empowered to seize or arrest such fugitive and take him before a proper officer, to the end that a warrant may be obtained for removing him to the state from which he had fled. As I read and understand this statute, it clearly contemplates that the right to reclaim a fugitive slave shall not be exercised except by due process of law, and never *vi et armis*. Such, at least, was the contemporaneous interpretation by congress of this provision in the constitution, and would forbid to the owner, and if to him, then surely to his agent or attorney, the right by strong hand, by fastened hatches, blows and handcuffs, to enforce a reclamation. And such a construction seems to me most consonant with the principle of our institutions, which forbids that any one shall be deprived of life, liberty or property, except by due course of law.

The supreme court of the United States, however, seem, in the case of *Prigg* v. *Com. of Penn.* (16 Peters, 539,) to have

intimated a different opinion, though as that point was not necessarily before them, and as the question submitted to them by counsel, was the constitutionality of a law of Pennsylvania, and the power of the legislature to pass any law upon the subject, it may well be doubted whether their remarks were not *obiter dicta*. But if they are otherwise, if pertinent and decisive, they are carefully guarded with the qualification that the party may "claim and retake his wife, child, or servant, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace," — "and the owner may seize and recapture his slave whenever he can do it without any breach of the peace, or any illegal violence."

The general language of the return in this case, and the right assumed under it, might justify the resort to illegal violence in seizing and retaking the slave. The right to retake him or to hold him in durance is, in the return, founded on the asserted fact that he is "a fugitive from service in the state of Georgia, under and by virtue of the laws of which state he is held to labor and service as the slave of Charles Chapman, of Bryan county, in said state," and the fact that he had concealed himself on board the vessel for the purpose of escaping from such servitude. If this fact alone, without any qualification, without any averment that the restraint was without illegal violence, would justify this restraint, then it would of necessity justify restraint in a riotous manner, or by a breach of the peace. That could not be defended in the owner, and of course not in his agent or attorney. If it were otherwise, the master of the vessel, in this case, would be justified in holding the slave, at the point of the bayonet, with closed hatches and with chains. But it is unnecessary to dwell upon this consideration, for the master of the vessel cannot justly be regarded as the agent or attorney of the owner. It is not pretended that he has any express authority from the owner. The facts of the return preclude the idea.

It is contended that the authority is implied from the laws of Georgia. To this claim there are several very conclusive answers. 1. The laws of Georgia do not operate beyond her territory. From the first moment when the respondent discovered the boy on board his vessel, and began the exercise of his control over him, until the present time, he has been without the jurisdiction of Georgia — beyond her territory, and beyond the operation of her laws. And to allow this claim would be in effect to call upon the magistrates of this state, within our territory, to execute the laws of Georgia, not to enforce a right which had become perfect

within her territory, but one that had no beginning even till her boundaries had been passed. I am not aware that the obligation of one state to give full faith and credit to the public acts, records, and judicial proceedings of every other state, has ever been carried to that extent. How can it be, without subjecting the territory of every state to the jurisdiction of at least twenty-seven independent sovereignties?

2. The laws of Georgia do not of themselves contemplate any such agency. It is true that by those laws any person may apprehend a fugitive slave, and return him to his master. But this confers no special authority upon the respondent, to the exclusion of every body else. "Every person" may do it, and how can it be said that this makes him, more than any other person, the owner's agent? "Every person" may just as well be such agent as the respondent. But that statute, in its very terms, is intended to operate within the territory of Georgia, and not beyond it. Or why the provision that, within forty-eight hours after the apprehension, the slave shall be sent back to his master? If the manucaptor in Maine should retain him for forty-eight months, or forty-eight years, could the jurisdiction of Georgia reach him with its penal inflictions? Why the provision that he who harbors a slave shall be confined in the penitentiary? Could a citizen of New York be condemned to the penitentiary of Georgia for harboring the slave in New York? It is evident that the statute was calculated only to operate within the territory of Georgia, and the sovereign authority of that state would doubtless be not a little surprised to learn that so wide a range of authority was claimed for its enactments. Numerous difficulties would spring from the establishment of the principle contended for. Though in this case there is no reason to apprehend that aught would be done that conscience and the law would not sanction, yet it is worth while to consider the effect of the decision in case it should be drawn into a precedent. How long may the master of a vessel, under such circumstances, detain the slave within our borders? Days, months, or years? What security is to be afforded that the slave will be returned to the person entitled to his service, and not be sold elsewhere into bondage? What is there to prevent our own free citizens from being carried away into slavery? Our protection would be very imperfect, if the law should be so established.

As then the respondent cannot with propriety be regarded as the agent of the owner, and as such owner does not present a claim to the services of this boy, either by himself, or by his agent or

attorney, the prisoner cannot be held, under the constitution, or laws of the United States, as a fugitive from service, and must be discharged, unless he can be held under the laws of our own state. Our Revised Statutes (1 Rev. Sts. 659, § 15,) contain a provision, that whenever a person of color, owing service in another state, shall secrete himself on board a vessel and be brought into this state in such vessel, the captain may seize him and take him before the mayor, &c., who may inquire into the circumstances, and give a certificate which shall be a sufficient warrant to the captain to carry or send such person of color to the port or place from which he was brought. And on the argument, it was suggested, that *non constat* the respondent held him in custody for the purpose of taking him before an officer under such statute.

It has been well questioned on the argument, whether our legislature had any authority to enact such a statute. In *Prigg's case*, (16 Pet. 617,) Story, J. says, "the legislation of congress, if constitutional, must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it. For if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the states have a right to interfere." In *Houston* v. *Moore*, (5 Wheat. 1,) it is expressly held, that where congress have exercised a power over a subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress. In *Prigg's case*, (16 Pet.) the court held that the power of legislation on the subject is exclusive in the national government, and cites with approbation the language of Chief Justice Marshall, in *Sturgis* v. *Crowninshield*, (4 Wheat.) "Wherever the terms in which a power is granted to congress, or the nature of the power, require that it should be exclusively exercised by congress, the subject is as completely taken from the state legislatures as if they had been forbidden to act." And after discussing the evils that might arise from state interference, concludes, "surely such a state of things never could have been intended under such a solemn guaranty of right and duty." The nature and objects of the provision imperiously require that, to make it effectual, it should be exclusive of state authority.

But still the police power is left to the states, so that the rights of the owners be in no just sense interfered with. And whether the provision of our Revised Statutes is constitutional or not depends upon this question — whether it was intended and would necessarily operate merely to advance and enforce the rights of

the owner, or to secure the state from the depredation and evil example of the fugitives. If the former, the statute cannot be sustained. Yet in this case it is invoked solely for the benefit of the owner, and the statute provides, not that the fugitive shall be removed from our territory — which would be all that would be necessary if our own welfare alone was consulted — but that he shall be delivered up to the master of the vessel, to the end that he may be carried back to the port from which he was brought. The constitutionality of this provision of our Revised Statutes may therefore well be questioned. But it is not necessary to decide that point. It is enough that it is nowhere in the return alleged that the respondent claims, or did claim to hold the slave for any such purpose. The claim, as has already been stated, is founded solely on the fact that George is a slave, and that fact is set forth in the return in such general terms, that at one moment it is urged as sufficient to justify a claim to hold him as the agent of the owner, and at another as the captain of the vessel; at one instant as justified by a well defined provision of our national constitution, and at another by a doubtful local statute.

The fact set out in the return does indeed support the one claim as well as the other. But that circumstance of itself shows that the averment is too defective to be available under either aspect. Besides, the fact would justify a still broader claim, that, namely, of any person who should please, within our territory, to arrest him as a fugitive from service. If the respondent was in fact holding the boy in pursuance of this statute, and for the purpose of taking him before the mayor, that his liability to servitude might be adjudicated upon, he ought to have averred, in his return, and this, not merely as matter of form, but as matter of substance, that the prisoner might have taken issue upon it. To seize him and take him before the mayor, &c., would require a very brief period of time, yet, consistently with the truth of the return, he may have been detained for days after his seizure, and after his arrival in this port. If, on an issue joined, such should appear to be the fact, any court or jury might — nay, would be bound in common fairness to declare, that he had not been held for any such purpose. In a case involving personal liberty, where the fact is left in such obscurity that it can be helped out only by intendment, the well established rule of law requires that intendment shall be in favor of the prisoner.

We have not in the return anything to warrant the idea that the respondent was holding the slave for the purpose of taking him before the mayor, under the state statute, except the facts that he

was a slave, that he had concealed himself on board the vessel and was there held in durance. And those facts would just as well warrant the idea that he held him as the agent of the owner, under the laws of the United States, or held him for the purpose of selling him into bondage elsewhere. This claim, resting as it does on a doubtful statute, and unsupported by the facts, must also fall to the ground. And the respondent is left before us to be regarded as one having no authority in the matter, but as preferring a claim to the custody of this boy, simply because he has admitted himself to have been a slave. To allow the claim in this case would justify his being surrendered to any other stranger who might demand him, in order to transport him into closer and more enduring bondage, or to conceal him beyond the reach of his lawful master.

The boy Kirk was accordingly discharged.

White and *Jay*, for the petitioner.
Blunt, for the respondent.

New-York Circuit Court, October, 1846.

MATTER OF GEORGE KIRK.

The provision in the Revised Statutes of New York, giving authority to the mayor or recorder of the city of New York, in the case of a slave who secretes himself on board a vessel, and is brought into the state in such vessel, to inquire into the circumstances, and give a certificate which shall be a sufficient warrant to the captain to carry or send such slave to the port or place from which he was brought, is unconstitutional and void.

The legislation of congress upon the subject of fugitive slaves must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it; but cannot interfere with the police power belonging to the states, by virtue of their general sovereignty. The provision of the Revised Statutes in question does not come within that police power.

AFTER the boy Kirk was liberated, as mentioned in the preceding case, he was again arrested, on the same day, on a warrant issued by the mayor, for the purpose of bringing him before that officer, under the provisions of the Revised Statutes. Judge Edmonds was immediately sent for, and a writ of habeas corpus was served upon the mayor, returnable forthwith. Mr. Jay then served upon the district attorney a formal demand, (based upon a provision of the statutes,) that he should appear in behalf of the slave. Mr.

Blunt appeared on behalf of the captain of the vessel, and Mr. Brady, the counsel for the corporation, on behalf of the mayor, who, with Judge Edmonds and the recorder, occupied the bench of the court of sessions. Mr. Blunt raised objections to the form of proceedings, on the grounds, — *first*, that Judge Edmonds had no right to issue the writ, as the application for such writ was directed to no individual judge, but to "the circuit judge;" and, *secondly*, that Judge Edmonds had no right to issue such a writ during the sitting of the "supreme court," probably still in session at Rochester. The next morning Mr. Brady, as counsel for the mayor, made a return to the writ of habeas corpus issued by Judge Edmonds, in which he set forth the circumstances in relation to the slave being found secreted on board of the vessel, and his arrest on the application of Captain Buckley, in order to obtain a certificate authorizing him to take him back; that the boy was brought before him yesterday, and that he was about to inquire into the facts of the case as he was bound to do by the statute of this state, when, by consent of the parties, the investigation was postponed until six o'clock on the same day. In the meantime a writ of habeas corpus was served upon him, and in making a return to that writ he insisted that he had the right, by the laws of this state, to make the investigation, and that consequently he held the boy in custody for that purpose. After reading the return, Mr. White, of counsel for the slave, demurred to the whole return.

John McKeon, district attorney, and *White* and *Jay*, for the petitioner.

James T. Brady and *Blunt*, for the respondent.

Edmonds, J. delivered the opinion of the court on the 31st of October. When this boy was before me on a former occasion, no principle of law was involved, but mainly a question of fact arising out of the return. On the present occasion it is quite otherwise. The question now presented is the constitutionality, and consequently, the validity, of a statute of our state. It is not from any choice on my part, that I am called upon to consider this question. If my wishes had been consulted, the case would have remained with the mayor until he had decided it, and even then, I should have been much better pleased if the review of his decision had been committed to some functionary, whose other duties would have allowed him more leisure than I can command to examine it. But the party had a right to bring the matter at once before me; under our statute, I was bound to allow the writ of habeas corpus, even

if I had been fully convinced of the legality of the imprisonment; and the return made to the writ necessarily raising the question to which I have alluded, it becomes my duty to consider and decide it; a duty from which I am not at liberty to shrink, and which I hope I may be able to discharge without partaking of the excitement which has surrounded the question from the beginning.

It is conceded on the record that George is a slave, owing service to a master in Georgia; that without the consent of his owner, and without the knowledge of the officers or owners of the vessel, he concealed himself on board the brig Mobile, in the port of Savannah, for the purpose of securing a passage to New York; that his being on board was not discovered by the officers of the brig until they had been at sea two days on their return voyage, and had got without the territory of Georgia: that as soon as he was discovered, he was arrested and confined until his arrival in this port, and that on his arrival, the captain took him before the mayor, to the end that he might obtain from the mayor a certificate which should warrant him in returning the boy to the port of Savannah; that the owner of the slave does not demand him under the constitution and laws of the United States, but he is demanded by the claimant, simply by virtue of his station as master of the vessel, and by virtue of a provision of our statutes. Such are the facts of this case. The law applicable to it, is to be found in § 151, Rev. Stat. 659, which enacts that whenever any person of color, owing labor or service in any other part of the United States, shall secrete himself on board of a vessel lying in any port or harbor of such state, and shall be brought into this state in such vessel, the captain or commander thereof may seize such person of color, and take him before the mayor or recorder of the city of New York. The officer before whom such person shall be brought, shall inquire into the circumstances, and if it appear, upon proper testimony, that such person of color owes service or labor in any other state, and that he did secrete himself on board of such vessel without the knowledge or consent of the captain or commander thereof, and that by so doing he subjected such captain to any penalty; such officers shall furnish a certificate thereof to such captain or commander, which shall be a sufficient warrant to him to carry or send such person of color to the port or place from which he was so brought as aforesaid.

It must be constantly borne in mind, that the question before us does not grow out of, nor is it in any way connected with an attempt, on the part of the owner of the slave, to enforce his rights under the constitution of the United States and the law of congress

of 1793, but arises solely out of a state statute, which authorizes another person, in no respect connected with the owner of the slave, nor acting by his authority, to re-transport him from our territory to the place where he had been held in bondage, and where again he may be returned to bondage. In other words, while the constitution of the United States gives to the party to whom the service or the labor may be due, the right to reclaim his servant, and the law of congress extends that right to the agent or attorney of such party, it is claimed that the state legislature has a right to interpose and extend the right to a third person, not acting for or by authority of the owner, but merely because he was the commander of a vessel on which the slave may have concealed himself, and because by such concealment, the commander may have become liable to a penalty. Such is the authority which the mayor has been called upon to exercise, and which it is insisted has not been, and cannot be conferred upon him by the state legislature.

Two objections are raised to this claim of authority. 1. That the provision of the revised statutes authorizing the proceeding, has been virtually repealed by an act of our legislature, passed in 1840. 2. That if it has not been repealed, it is repugnant to the constitution of the United States, and therefore inoperative and void. The conclusion to which I have arrived on this point renders an examination of the first unnecessary.

The section of the revised statutes under consideration is part of title VII. of chap. 20 of the first part, which is entitled, "Of the importation into this state of persons held in slavery, of their exportation, of their services, and prohibiting their sale;" and is a revision of the act of 1817, entitled "an act relative to slaves and servants." The 30th section of the act of 1817, which contains the provision which has been incorporated into this 15th section of the Revised Statutes, is preceded by a recital that "whereas persons of color owing service or labor in other states, sometimes secrete themselves on board of vessels while such vessels are lying in the ports or harbors of other states, and thereby subject the commanders thereof to heavy fines and penalties." And it is worthy of observation that the act of 1817, as well as this title of the revised statutes, aims at prohibiting the exportation as well as the importation of slaves, and that while the act of 1817 abolishes slavery after the 4th of July, 1827, the revised statutes declare that every person born in this state shall be free, and every person brought into this state as a slave, except as authorized by this title, shall be free. It may well be questioned whether, as this slave was brought into this state in a manner not authorized by the revised statutes, he did not

thereby, under our law, become *ipso facto* free, and whether this proceeding before the mayor is not, therefore, in effect, a proceeding to carry a free citizen into bondage. But I do not consider that point, as it was not raised before me in the argument, was not discussed, and is not necessary to the decision of the question before me. The broad question discussed, and which I am called upon to decide, is, whether our state legislature have authority to pass this law.

The point has never, as far as I can learn, been decided, or even agitated in our state, and it is presented to me not only as a new one, but in the imposing form of requiring from me a decision that a law of our state is repugnant to the constitution of the United States, and therefore void. Fully aware of the diffidence with which courts should always entertain such questions, I approach this with all the caution becoming the gravity of the case, yet with a lively sense of what is due to personal liberty and the fraternal relations existing among the members of the union. As I have already mentioned, the statute under consideration was first enacted in 1817, and was subsequently re-enacted and went into effect as part of the revised statutes, in 1830. In 1834, the supreme court of this state, in *Jack* v. *Martin* (12 Wend. 311,) held that the law of congress, in regard to fugitive slaves, was supreme and paramount from necessity — that so far as the states are concerned, the power, when thus exercised, is exhausted, and though the states might have desired a different legislation on the subject, they cannot amend, qualify, or in any manner alter it — that though the act of the state might not be in direct repugnance to the legislation of congress, it does not allow that it is not in legal effect; that if they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other so far as they do differ; that a fair interpretation of the terms in which the provision of the constitution is expressed, prohibits the states from legislating upon the question involving the owner's right to this species of labor; and that while the law of congress, thus passed, exists, the power of the states is suspended, and, for the time, is as inoperative as if it had never existed. The case of *Jack* v. *Martin* was carried to our court for the correction of errors, and the judgment of the supreme court was affirmed. Though the reasons given for the decision in the court of last resort, as reported in 14 Wendell, 507, differ from those given in the court below, the positions of the supreme court, as I have extracted them, were in no respect disturbed, but have ever since remained and

are now the law of the land, governing the courts and citizens of this state.

In 1842, the supreme court of the United States, in *Prigg* v. *Pennsylvania* (16 Peters, 539,) had the same question before them. It arose out of various statutes which that state, as well as New-York and other northern states, had, from time to time, been enacting on the subject of slavery, and which contained, among other things, provisions very like ours in regard to slaves who had absconded from other states. Judge Story, in delivering the opinion of the court, declares that the law of congress may be truly said to cover the whole ground of the constitution, not because it exhausts the remedies which may be applied, but because it points out fully all the modes of attaining the object which congress have as yet deemed expedient or proper to meet the exigencies of the constitution. And he adds: if this be so, then it would seem, upon just principles of construction, that the legislation of congress must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it. For, if congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. This doctrine was fully recognized by the court, in *Houston* v. *Moore*, (5 Wheat. 1) where it was expressly held that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for state legislation to add to the provisions of congress upon that subject.

This is the supreme law of the land, which I am bound to obey, and is applicable to the case before me in this aspect, that while congress, in the exercise of its constitutional power over fugitives from service, has given the right to retake and reconvey them to the place of service, to the party to whom the service is due, his agent or attorney, the state legislation adds to the provision of congress on that subject, by conferring the power of recapture and reconveyance upon the commander of a vessel on board of which the fugitive may have concealed himself. If it may add, may it not diminish? And if state legislation once begins, where is it to end, and what bounds are to be set to it, but state discretion?

Well, indeed, did our supreme court repudiate the idea, that the framers of the constitution intended to leave the regulation of this subject to the states, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the states in respect to it. While this construction of the constitution — though recent in its promulgation, yet old as the instrument itself, — was conceded on all hands during the argument before me, it was contended that our statute did not fall within its destroying influence, because it was only a police regulation, and therefore legitimately within the scope of state authority.

In 16 Peters, 625, Judge Story qualifies the decision of the supreme court of the United States, by saying that they were not to be understood in any manner to doubt or interfere with the police power belonging to the states, in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and is distinguishable from the right and duty secured by the provision of the constitution under consideration. It becomes therefore material to inquire, what is the police power here alluded to? and does our statute justly and properly fall within its scope? In 16 Peters, the same learned judge speaks of this power as conferring full jurisdiction on the states to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course; and in many cases, the operations of this police power, although designed essentially for other purposes for the protection, safety and peace of the state, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with, or obstruct the just rights of the owner to reclaim his slave, or with the remedies prescribed by congress to aid and enforce the same. In *New York* v. *Milne*, (11 Peters, 139,) Mr. Justice Barbour, in delivering the opinion of the court, applies this test to determine the nature of the power. Did it belong to the state before the adoption of the constitution? Has it been taken from the states and given to congress? Or does it fall within that immense mass of legislation which embraces everything *within the territory* of a state not surrendered to the general government? And the power then under consideration was held to be of that "mass," because its place of operation was within the territory, and therefore within the jurisdiction of the state; because the person on whom it operates was found within the same terri-

tory and jurisdiction; because the persons for whose benefit it was passed were the people of the state; because the purpose to be attained was to secure the protection of that people, and because the means used were just, natural and appropriate to those ends.

Complaint was made during the argument, that this police power was exceedingly vague, uncertain and undefinable, and hence, I suppose, an inference was to be deduced, that I ought to regard the claim of power with little favor at least. In the very nature of things it must be difficult, in few, or perhaps in many words, to define the power; for it comprehends an immense mass of legislation, inspection laws, quarantine laws, health laws, internal commerce, roads, ferries, &c. &c. Yet, immense as is this mass, and various as are the interests embraced in and affected by it, it seems to me that the rules laid down by the supreme court of the United States, as I have already quoted them, and the tests which they provide, are plain and simple, and easy to be understood, and in their application to this case entirely decisive and satisfactory in the result to which they lead us. To apply first, the rules given us in the case of *Prigg*, in 16 Peters. The police power "extends over all subjects within the territorial limits of the state," yet our statute does not confine its operation within our limits; but provides, in case the fugitive is from another state, for the return of the fugitive back to the place whence he fled. We "may remove slaves from our borders to secure ourselves against their depredations." To transport the slave to Canada or Connecticut would effect this purpose, yet that is not allowed by our statute. He must, in compliance with its command, be returned only to his place of bondage. "The rights of the owners are not to be interfered with or regulated." Yet what is a compulsory return of the slave, with or without his owner's consent, to the place whence he fled, but an interference with, or regulation of, the master's right to control his movements and govern his person? The state regulation is, "not to interfere with the remedy prescribed by congress." Congress has limited the power of recaption to the owner, his agent or attorney, but our state law has removed that limitation. Congress has protected the rights of the owner, by securing the reclamation to him and those appointed by him, yet our statute gives to the commander of the vessel the power of transporting the slave beyond even the reach of the owner.

Such is the result of the rule furnished us by Judge Story. The application of Judge Barbour's tests will be found equally satisfactory and conclusive. Is the power exercised in this statute one "embracing a matter within the territory of the state, not surren-

dered to the government, and which can be most advantageously exercised by the state?" It cannot be most advantageously exercised by the state. It cannot, indeed, be exercised at all without the consent of the state from which the slave fled. Suppose that any slave state should forbid the return to its territory of a fugitive slave, could our law commanding his return be enforced? It could be enforced only by the national government, and therefore the power has been surrendered by the states to the general government. Such is the conclusion of our supreme court and the supreme court of the United States. Not an element, then, of Judge Barbour's definition, is left to apply to this statute. But to proceed with his tests: We are to look at the place of its operation to see that the statute operates within the territory of New York; yet the main object of this statute plainly is, not the removal of the slave from our borders, but his return to the place whence he fled, involving of necessity the operation of our statute, without our territory and without our jurisdiction. Could it be more so if it provided that every vagrant arrested in our streets should be transported to, and abandoned in, the streets of Savannah?

We are next to look at the person on whom it operates, to see that he is within the same territory and jurisdiction; yet this statute must, of necessity, operate both on the slave and the commander of the vessel more out of the state than in it. We are next to look upon the persons for whose benefit it was passed, to see that they are the people of our state. Yet this statute does not confine the power of re-caption to the commanders of vessels, being citizens — it confers it on all commanders, reside where they may. And it is far from being limited to those for whose protection and welfare, in the language of Judge Barbour, our legislature is bound in duty to provide. We are next to turn our attention to the purpose to be attained, to see that it is to secure that very protection and provide for that very welfare. The argument is, that this statute had its origin in the desire to protect our citizens from the evil example of having slaves among us, yet that very statute prohibits the removal of slaves from our territory by highly penal enactments; and surely if the welfare of our citizens and their security from the evil example of slavery were the object in view, it could be attained as well and far more easily by transporting the slave to a free state, which it prohibits, than to a slave state, which it absolutely commands.

And lastly, we are to examine the means by which these ends are to be attained, so that they bear a just, natural, and appropriate relation to those ends. There is no special pleading, no refine-

ment of reasoning, that can disguise from a common understanding the fact, that the whole object of the statute was, to allow the commander of the vessel to protect himself by retaking and returning the fugitive; and the means used, namely, the examination and adjudication by the mayor, and his certificate, were natural and appropriate to that end, and to none other. If any other end had been in view — if the protection of our people at large had been aimed at — there would have been something compulsory in the law, something rendering it obligatory on the captain to afford us the desired protection. But everything is left to his discretion. If he please, he may retake, and, after retaking, if he please, he may return the slave to the place whence he fled. If the captain should chance not to be a citizen of this state, it would be difficult to discover how it could benefit this state, yet under no circumstances would it be difficult to see how it could benefit the owner to have his fugitive servant placed again within his reach. In every aspect in which I view this statute, I cannot help regarding it as intended and calculated to aid in returning a fugitive slave to his master: and it seems to me that the claimant in this case and his counsel have so understood the law, and have acted accordingly. Else why was the boy confined on board the vessel after her arrival here? Why does the captain plead his obligations to the laws of Georgia, when those laws compel him to return the boy to his owner? Or why, when George was making every effort, with the assistance of numerous friends, to escape from the state, did the captain invoke the aid of the police to arrest those efforts; and why does he now press this claim, but that he may do that which the constitution and laws of the United States declare shall be done only by the party to whom the service is due, or his agent or attorney? I do not allude to these considerations for the purpose of even implying a censure upon the commander of the vessel or her owner, but solely with a view of drawing from his acts, and those of his very respectable counsel, the construction justly flowing, that he and they do in effect and from necessity understand our statute precisely as I do, namely, in the language of the U. S. supreme court, as by way of complement to the legislation of congress, prescribing additional regulations, and what they deem auxiliary provisions for the same purpose.

It must have occurred to all who have given this subject much consideration, as it has to me, to observe the extreme watchfulness with which this provision of our national constitution has been regarded by our highest courts. It is not worth my while to pause and inquire into the cause or the propriety of this. It is enough to

know that whenever any state legislation, attempting to intermeddle with the question, has come before our highest courts, it has without ceremony been swept from the statute book. Our statute regulating and controlling the master's right of reclamation, and allowing to the alleged slave the benefit of the writ of *homine replegiando*, fell before the decision of our supreme court in Jack's case. The laws of Pennsylvania, running through a period from 1780 to 1826, and containing a provision like that now under my review, were overturned by the supreme court of the United States in Prigg's case; and I only discharge my duty — obey, indeed, merely one of its plainest and most simple dictates — by declaring that the rule of law thus laid down by the highest judicial tribunals in the country, and whose decisions I am bound to respect and to enforce, is applicable to the statute in question, and being applicable, renders the statute null and void, and the arrest and detention of Kirk under it, improper.

It will be observed that I have omitted to discuss many considerations which were pressed upon me during the argument. The view which I have taken of the case rendered their discussion unnecessary, but I will briefly allude to one topic, because, if the danger apprehended were to ensue, it would be the only cause of regret which I should experience growing out of this case. I allude to the penalty which it is averred may fall upon the captain in case of his return to Georgia. I cannot persuade myself that there is any cause for fear. The slave was concealed on board his vessel without his knowledge or consent. He was not discovered until the limits of Georgia had been passed, and to have returned then to Savannah would not only have vitiated the captain's insurance, but have rendered him liable in an action to the boy; and since his arrival in this port, he has resorted to every means which our law allows, to return him to his place of servitude. And, if he shall be finally defeated in his attempts, it will not be from any want of effort on his part, but from a determination on the part of the authorities of this state, to avoid state usurpation, and to maintain the constitution as it has been interpreted by the highest tribunals in the country. It cannot be that, under such circumstances, he can have any thing to fear from the penal enactments of Georgia. If, however, contrary to all just calculation, those fears should yet be realized, our regard for the individual may not warp the law from its uprightness, though it may well excite our regrets that its integrity cannot be maintained without unmerited suffering. This boy must at all events be discharged; the law allows it, and the court awards it.

Digest of American Cases.

Selections from 1 Gilman's (Illinois) Reports.

ATTACHMENT.

An attachment is a lien from the date of the levy, when followed by a judgment, which relates back to it. *Martin* v. *Dryden*, 188.

2. An attaching creditor, who levies his attachment without notice of the prior deed, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale and deed, will hold the legal estate, as against the purchaser in the prior unrecorded deed; and that, too, although at the time of the levy of his execution, and sale, he had notice of the deed. Whatever he had acquired, as an innocent creditor without notice, he has a right to perfect and secure to himself, notwithstanding a subsequent notice. *Ib.*

3. Where a judgment by default is rendered in a suit by attachment, without personal service of process on the defendant, the judgment is *in rem*, and the estate attached is alone liable for its payment. In such case, a special execution issues for the sale of the specific property. But where the defendant is served with process, or appears to the action, the judgment is *in personam*, and the plaintiff is entitled to a general execution thereon. *Conn* v. *Caldwell*, 531.

4. The appearance of a defendant in attachment does not release the lien, for this can only be accomplished by a replevy of the property attached, or by giving security for the payment of whatever judgment may be rendered in the cause, as provided by the twenty-ninth section of the Attachment act. *Ib.*

5 .A steamboat, among other property, was levied on by virtue of a writ of attachment; but by agreement between the plaintiff in the writ and the master of the boat, the boat was to proceed on its voyage, and on its return, to be delivered to the sheriff, subject to the writ: *Held*, that the lien was not thereby extinguished, but subsisted as between the parties to the suit. *Ib.*

BILL OF EXCHANGE.

A bill of exchange, drawn by one resident of this state upon another resident, is an inland bill of exchange. *Kaskaskia Bridge Co.* v. *Shannon*, 15.

2. In the case of inland bills of exchange, the notarial protest is not evidence of a demand of payment on the drawee, nor of notice of nonpayment to the drawer. *Ib.*

3. The drawer and the drawee may be the same person in a bill of exchange; but, in such case, though a demand on the drawee is necessary, notice of nonpayment to the drawer is unnecessary. *Ib.*

4. In a suit by indorsees against their immediate indorser for non payment, proof of non payment and notice are sufficient to sustain it. *Bradshaw* v. *Hubbard*, 390.

5. In an action between an indorsee and his immediate indorser, the bill of exchange is evidence under the common count. *Ib.*

CHANCERY.

If the complainant in a bill waive the oath of the defendant, and the defendant files his answer under oath, the court will give no further effect to such answer, than if it had not been sworn to. *Moore* v. *Hunter*, 317.

2. Courts will take notice of the rights of an assignee of a chose of action, and protect him against the fraud of the original contracting parties. *Fitzpatrick* v. *Beatty*, 454.

3. Although the rule of law is inflex-

ible, that a written instrument cannot be altered by parol proof, yet the court of chancery will never hesitate to rectify mistakes in fact, which have occurred in drawing up the paper, when a proper case is presented and clearly proved, and then carry into effect the instrument when thus corrected, as if it had been written as the parties supposed it was at the time. *Broadwell* v. *Broadwell*, 599.

4. Where parties make a particular agreement, which is correctly reduced to writing, the court will be confined to the writing itself to ascertain what was their intention; and will not inquire whether the parties did not intend to effectuate a different object from that which the legal effect of the instrument indicates. *Ib.*

5. Where an agreement is made in ignorance of some material fact, the court will extend relief, but will not make a new agreement for the parties. But if the parties are acquainted with all the facts on which their rights depend, and then enter into an agreement under a misapprehension as to the nature and extent of those rights, courts of Equity rarely, if ever, interfere with them. *Ib.*

6. Formerly courts would not relieve against a mistake of facts, unless it was admitted by the defendant; but latterly they have allowed the defendant's answer to be disproved, though they have never rectified any such mistake, unless it was admitted by the defendant, or was most clearly and explicitly proved. *Ib.*

7. Fraud is an exception to the rules laid down, and that may as well be committed in an intentional misrepresentation of the law, as of the facts. When that is established, the courts will not only refuse to enforce a specific performance of the agreement, but they will relieve against it. *Ib.*

8. A specific performance will not be decreed, unless the agreement has been entered into with perfect fairness, and without misapprehension, misrepresentation or oppression. A meritorious case must be presented before the court will act affirmatively to enforce specifically the agreement. *Ib.*

9. In applications for specific performance of agreements, it is immaterial what the form of the instrument is, whether it be a covenant, or a penal bond with a condition to do the thing. *Ib.*

10. Where the performance of a thing is secured by a penalty, the doing of the thing, and not the payment of the penalty, is considered the substance of the transaction. The parties may, however, stipulate, that the obligor shall have the option, either to do the thing, or pay the penalty; but such a construction will not be given to the instrument, unless it is clear from the face of it, that such was the intention of the parties. *Ib.*

11. Where a sale has been regularly and fairly made by an administrator under an order of court, for a valuable consideration, and the deed executed by one administrator only, where there are two, the court will not permit advantage to be taken of such defective execution of a power, but will compel the co-administrator to join in the execution of the power. If it were a mere power, the court would not, but where there is a duty and trust to be performed by the proper exercise of the power, the court will compel it. *Thorp* v. *McCullum*, 614.

12. The principle of equity is, that trustees and others, sustaining a fiduciary and confidential relation, cannot deal on their own account with the thing, or the persons falling within that trust, or relationship. This rule is not universal, but general, and has been applied to those who are strictly trustees, to assignees, commissioners, and solicitors of bankrupts, executors, administrators, guardians, agents, and officers of the court, and all others, in whom there is a trust and confidence reposed, which would bring in conflict, the interest of the trustee and the *cestui que trust*. *Ib.*

13. Exceptions to the foregoing rule have been made in the courts of Virginia, Kentucky, and of England; but the broad rule now obtains, that all persons sustaining fiduciary relations to persons or property entrusted to their management, cannot hold such property by purchase, if the *cestui que trust*, or those for whom they act, or who are interested in the property, object to their purchase within a reasonable time. The purchase is not void, but voidable. *Ib.*

14. If a trustee purchase the property entrusted to him, the sale may be set aside by a bill in equity for relief filed by those interested in the property, and the court will order a re-sale, and if, upon such re-sale, no advance is made upon the sum paid by the trustee, the court will hold him to the purchase. *Ib.*

15. A. and B. were administrators, and obtained an order of court to sell the real estate of the intestate for the payment of debts. A sale was made. A. purchased the estate, and a deed was made by B., but he omitted to recite the order of court in the deed. A. afterwards sold the premises to C., and C. to D., who entered into possession, and made valuable improvements. The heirs of the intestate commenced an action of ejectment against D. for the land, when C. and D. filed their bill for an injunction, and to compel the administrators to perfect the deed. The bill was demurred to, and the demurrer sustained: *Held*, that the demurrer was not an election to disaffirm the sale, and that an election could not be made by demurrer. *Ib.*

16. Parties coming to ask the aid of a court of equity, must come not only with clean hands, but with the merits of a good or valuable consideration paid, or an offer and readiness to perform all things on their part. *Ib.*

FRAUD.

A deed made to defraud creditors will be binding *inter partes*, though liable to be avoided so far as it might be intended to defeat the just demands of others. Fraud vitiates all acts, and is as well cognizable in courts of law, as in courts of equity. *Lowry* v. *Orr*, 70.

2. A refusal, on the part of an agent, to explain circumstances, which explanation, when given, does not at all vary or affect the rights of the parties, will not amount to a fraud. *McDonald* v. *Fithian*, 266.

3. Fraud does not descend to one's heirs, unless connected with some property which descended to them, the title of which is tainted with the fraud. *Draper* v. *McFarland*, 310.

JURORS AND JURY.

One of the jurors who tried a cause was security for costs therein, and objection was raised on that account, on a motion for a new trial: *Held*, that the law would presume that the party had knowledge of the pleadings, and files in the cause, and that he could not allege surprise as a ground for a new trial; but the fact would have been good cause of challenge, and neglecting to avail himself of it, he must be presumed as having waived the objection. *Bradshaw* v. *Hubbard*, 390.

2. Where a juror had formed and expressed a decided opinion on the merits of the case adverse to the defendant, and the fact was not known to the party or his counsel, after the exercise of proper diligence, by asking the juror before he was sworn whether he had formed and expressed an opinion, it was *held*, that the defendant was entitled to a new trial. *Vennum* v. *Harwood*, 659.

LIMITATION.

A writ of error does not lie until the final judgment in bar of the action is entered, and the statute does not run against a party until he is entitled to his writ of error. *Hedges* v. *Madison Co.* 306.

2. Where a bill showed equity on its face, and that about twenty years had elapsed subsequent to the creation of a trust, it was *held*, that lapse of time was not sufficient, of itself, to bar that equity. *Smith* v. *Ramsey*, 373.

MANDAMUS.

It is the duty of the proper officer to execute and deliver a good and perfect deed to the purchaser, for land purchased at a tax sale. If he fails, or neglects to perform this duty, he can be compelled to perform by a writ of *mandamus*; and so, also, would his successor in office, who has the same means of making a correction. What a court will compel an officer to do by virtue of this writ, he may be permitted to do voluntarily. *Maxcy* v. *Clabaugh*, 26.

NEW TRIAL.

A new trial will not always be granted, even if the jury find against the weight of evidence, against the instructions of the court, or through misdirection of the court on a point of law, provided the court is satisfied that justice has been done. *Gillett* v. *Sweat*, 475.

2. It is a general rule, that courts will not grant new trials, to enable the plaintiff to recover vindictive damages merely; but if he be entitled to nominal damages only, and the action be brought to try a question of permanent right, a new trial may be granted. *Plumleigh* v. *Dawson*, 544.

PRINCIPAL AND AGENT.

An agent cannot deal for his own advantage with the thing purchased for his principal, or become the seller, or buyer, to or of them, because of his confidential relation, and his duty to disclose to his principal every fact, circumstance or advantage in relation to the purchase, which may come to his knowledge. *McDonald* v. *Fithian*, 269.

2. Under a verbal agency, the agent cannot bind his principal in the purchase of real estate: and where one acts gratuitously in a relation of mere friendship, or instrumentality, he is not to be clothed with the character and all the responsibilities of an agent. But, even in this relation, he cannot avail himself of any information he may acquire, or of the confidence imparted, to commit a fraud upon the friend he consents to serve. All his acts must be in good faith. If the principal consent to a contract upon false and fraudulent information, materially affecting his rights, and in ignorance of the truth, he will not be bound by such consent. If fraud is proved, all the consequences should follow, whether the person acts as agent or friend, and with or without compensation for his trouble. *Ib.*

3. A refusal, on the part of an agent, to explain circumstances, which explanation, when given, does not at all vary or affect the rights of the parties, will not amount to a fraud. *Ib.*

4. The doctrine, that a power to make representations is implied from the nature of a general agency, seems to have grown out of mercantile transactions, where there are many strong reasons for holding the principal liable for the frauds of his agent. But it does not apply to one whose duty is prescribed by law; a school commissioner, for instance, whose only duty is to advertise and sell the lands as directed, after a proper subdivision and valuation of the land is made by the trustees of schools, and a map delivered to him, for the best price, by inducing, as far as is proper, a fair competition among the purchasers at the sale. *Cooke* v. *School Com'r. of Jersey Co.* 537.

PRINCIPAL AND SURETY.

The law is well settled, that if the creditor, by a valid and binding agreement, without the assent of the surety, gives further time for payment to the principal, the surety is discharged both at law and in equity; and it makes no difference, whether the surety may be thereby actually damnified or not. *Davis* v. *The People*, 409.

2. Where an act of the legislature gave a collector of taxes a longer time in which to make payment, than he had by the law in existence, when he executed his official bonds with sureties, it was *held* that the sureties were fully discharged, if the act was passed without their assent. *Ib.*

3. A surety is not permitted to discharge the debt of the principal, until he is in default, and can be legally called on for payment. *Ib.*

PROMISSORY NOTE.

A. and B. gave a joint and several note. B. paid the note, after which his name was cut off, and suit commenced in the name of the payee, for the use of B. against A. At the request of the defendant, the court instructed the jury, that if they "believe from the evidence, that the note sued upon has been paid, the plaintiffs cannot recover:" *Held*, that the instruction was properly given. *Gillett* v. *Sweat*, 475.

2. In an action against one upon a joint and several note made by two persons, the court instructed the jury, "that if they believe, from the evidence, that the note has been altered, by cutting off the name of one of the makers since the same was executed, and without the knowledge or consent of the defendant, that they will find for the defendant:" *Held*, that the instruction was properly given. *Ib.*

3. If a note, upon its face, appears to have been altered, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom it was done, and the intent with which the alteration was made, as matters of fact to be found by the jury. *Ib.*

ROADS.

If a road is used and travelled by the public as a highway, and is recognized and kept in repair as such, by the county commissioners and supervisor, whose duty it is by law to open and repair public roads, proof of these facts furnishes a legal presumption, liable to be rebutted, that such road is a public highway. *Eyman* v. *The People*, 4.

SALE FOR TAXES.

A deed to the purchaser of land sold for taxes must show that the land was sold for the taxes of a particular year. If it is ambiguous in this respect, it cannot be explained by parol testimony. *Maxcy* v. *Clabaugh*, 26.

2. No principle of law is more firmly settled, than that a party claiming title to land under a sheriff's sale, must, in an action to recover the possession of such land, before he can read the sheriff's deed as evidence of his title, produce the judgment and execution which authorized the sheriff to make such sale. The sheriff is the agent of the law, and, unless there is a judgment and execution, he has no authority to sell. The same principle governs in the construction of the revenue law. The legislature did not dispense with the production of the judgment and execution; the rule of the common law, therefore, applies, and the party claiming title under a sheriff's deed, executed upon a sale for taxes, before he can read it in evidence, must, equally with a purchaser at an ordinary sheriff's sale, produce the judgment and execution in evidence. *Hinman* v. *Pope*, 131.

WATERCOURSE.

In an action of the case for diverting a watercourse, evidence tending to show that the stream which had been diverted, might be made valuable as a power, and that, by its diversion, the plaintiff was damaged, is properly admissible. A special damage need not be proved in order to entitle him to a recovery. *Plumleigh* v. *Dawson*, 544.

2. A watercourse begins *ex jure naturæ*, and having taken a certain course, cannot be diverted. Every riparian proprietor has an undoubted right to use it for hydraulic purposes, if by so doing he do not injure another riparian proprietor. *Ib.*

3. The water power to which a riparian proprietor is entitled, consists in the fall of the stream, when in its natural state, as it passes through his land or along the boundary of it, and the water must pass from his land in its accustomed channel. *Ib.*

4. Property in water is indivisible, and all riparian proprietors are entitled to an equality of rights therein. They must use it as an entire stream, in its natural channel, and there can be no severance in parts for hydraulic purposes, without consent. *Ib.*

5. An upper riparian proprietor may erect a dam and hydraulic works, and use the whole stream to propel his mill, if he permit the water to flow in its accustomed channel to the land of the lower proprietor. *Ib.*

6. The doctrine is well settled, that where a riparian proprietor is deprived of his right, the law will imply a damage to him, and entitle him to nominal damages at least. An action, therefore, may be maintained without proof of actual damage. *Ib.*

WITNESS.

As a general rule, it is true, that leading questions cannot be put on the examination in chief, but it has its exceptions. Some of these exceptions are leading questions of introductory matter, leading and directing the mind and attention of the witness to the main question; to a witness hostile to the party calling him, and evidently adverse to him, or evasive, and such like. But they are only permitted under the exercise of a careful supervision, and sound discretion of the court, where it appears essential to promote justice. *Williams* v. *Jarrot*, 120.

2. A stockholder in a bank, or insurance company, may sell out his stock after the commencement of the suit, and thereby become a competent witness. *Ills. M. F. Ins. Co.* v. *Marseilles Manufac. Co.* 236.

3. Whenever there is a subscribing witness to the execution of a deed, it is not necessary to produce the witness on the trial, unless he is within the reach of the process of the court. If he is not within the state at the time of the trial, proof *aliunde* of the hand-writing of the subscribing witness and the grantor is admissible. *Wiley* v. *Bean*, 302.

Notices of New Books.

RATIONALE OF CRIME, AND ITS APPROPRIATE TREATMENT, BEING A TREATISE ON CRIMINAL JURISPRUDENCE, CONSIDERED IN RELATION TO CEREBRAL ORGANIZATION. By M. B. SAMPSON. From the 2d London edition, with notes and illustrations by E. W. Farnham, matron of Mount Pleasant State Prison, New York, D. Appleton & Co., 1846. 12mo. pp. 177.

This is an American edition, with apt notes and illustrations, of a book that has received much praise in England. It has been commended there by juridical, literary, medical, philanthropic and phrenological journals. It originally appeared, in the form of letters, in the London Spectator, a weekly newspaper of remarkable ability. The interest, with which we remember to have followed these letters from week to week, has been revived in the perusal of the present volume.

This work has in its favor the considerable success which it has already found in England; but, independent of any such commendation, it might appeal to American readers, by its own intrinsic character. The spirit in which it is written is of the purest Christian humanity. Its author must be a good man. He has fully embraced the duty of benevolence and kindness to his fellow men. But he is also a wise man, studious of human nature, and founding his theory of crimes and punishment on a careful examination of the human constitution. His style is simple and clear, as becomes his subject.

The treatment of crime is a subject which is not merely professional in its character. It is of interest to the lawyer, to the legislator, to the medical man, to the citizen, to all who are concerned in any way in the welfare of their race. The lawyer deals with it directly in court, in the administration of justice. To others it may present itself less practically, but still as an important topic connected with the duties of life.

The careful inquirer, who no longer receives things by rote, will not fail to ask, on the threshold of his studies, what constitutes crime? Definitions, handed down from a barbarous or unlettered antiquity, will not satisfy him. He will interrogate the human constitution, and seek to ascertain the causes or occasions of a departure from the rule of rectitude, and in this way strive to determine the measure of responsibility for the act which has been done. Crime is one form or phase of human conduct. Why does it occur? and how shall it be regarded? Jurisprudence, philosophy, and humanity earnestly join in these inquiries.

And it is precisely these inquiries which Mr. Sampson has met, in a manner at once novel and masterly. His book stands not more apart from other treatises in novelty, than in the elevated and humane character of its views. Nor can any one familiar with the history of the theories of crimes and punishments,—although he may fail to recognize the soundness of all parts of the present theory,—hesitate to regard it as second in importance to nothing on the subject since Beccaria. For the first time, an intelligible philosophy of the mind has been applied to the consideration of crime. The au-

thor, in the spirit of Lord Bacon, recognizes nature as the true object of inquiry, and proceeds to examine those manifestations of the human constitution, which are coincident with crime. He looks behind the act at the mind in which it had its origin. And this leads him to consider especially the brain, which is now recognized as the *organ* of the mind. For this truth we are mainly indebted to the physiological observations suggested by phrenology, although Jeremy Taylor, while speaking of the equality of souls, alludes to the *instruments* by which they act, as differing in temper and tune.

Mr. Sampson directs his inquiries to the organ or instrument by which the mind acts, and shows, it seems to us with conclusive force, that what is commonly called crime is to be referred to physical organization, in combination with external influences. To develop this doctrine would carry us beyond the limits of a notice. One consequence or corollary of it is, that all criminals are, in a certain sense, insane, or out of their right mind, and that their responsibility for their acts is precisely like that of persons usually regarded as insane. Mr. Sampson breaks down the distinction between crime and insanity. Without going so far as Hamlet, who exclaims, "they are all mad in England," he shows that there are few, if any, who have that completeness and balance of the faculties, which constitute perfect sanity. It is easily admitted that the insane are not responsible for what they do. But where does responsibility end, and irresponsibility begin? The conclusion of our author, that crime is the inevitable consequence of the mental condition of the criminal, and the circumstances in which he is placed, seems to place him in the same state of irresponsibility with the insane. And yet our legislature makes a wide difference. While it treats the latter with tenderness and commiseration, it brands the other with infamy. It dooms the one to the jail and the penitentiary. It shelters the other in a hospital.

If the views of our author are founded in truth, — and their importance will certainly justify a careful investigation, — they require a remodelling of our system of punishments; or rather such a change as shall exile the idea of punishment. The person who has violated a law is no longer to be regarded as a *criminal* to be *punished*, but as a *patient* to be *cured*. The disease or derangement of his mind and character is to be watched, and he is to be detained in careful custody, until he can with safety be restored to society. To many this may seem impracticable and visionary even; but science and humanity join in its support; and what they support must finally prevail. In the progress of prison discipline, we do not despair of seeing our jails, now grim with terror, metamorphosed into hospitals, warm with kindly care and love.

It is impossible, in our space, to touch upon all the topics handled in this work. The exposition of the true character of insanity will be of practical interest to all concerned in the administration of justice; and we doubt not Mr. Sampson's labors will often be invoked by counsel in the defence of criminals. We hope that they will be studied, especially by legislators, and, indeed, by all, whose opinions can in any way influence the making of laws. To him we offer our thanks for a contribution of such sterling value in the cause of human improvement. To Mrs. Farnham, the American editor — herself high authority on questions connected with the theory of crimes and punishments, — we are also grateful for introducing it to our country.

C. S.

New Books. — Archbold's Summary of the law relating to Pleading and Evidence in Criminal Cases; with the Statutes, Precedents of Indictments, &c., and the evidence necessary to support them. By John Jervis, Esq. Q. C. of the Middle Temple, Barrister at Law, with a patent of precedence. Fifth American, from the tenth London edition, much enlarged and improved, by W. N. Welsby, Esq. of the Middle Temple, Barrister at Law, Recorder of Chester. New York: Banks, Gould & Co., Law Booksellers, 144 Nassau st.; and Gould, Banks & Gould, 104 State street, Albany. 1846.

Intelligence and Miscellany.

English Criminal Law. — Nothing strikes an American with more surprise than the administration of criminal law in England, as exhibited in the newspaper reports. The summary manner in which the most important cases are disposed of is not more remarkable than the disparity of sentences imposed for the same or similar offences. It is true, that we may form erroneous opinions upon this point from the inadequacy of the reports, in giving all the minute facts and circumstances, which go to show the relative guilt of prisoners. But the fact that this disparity of punishment has long been noted and severely commented upon by journals of established reputation, shows that there is something radically wrong in a system under which there is such vast difference in the punishment of offences. Thus, we notice the case of a man recently tried for murder, in having caused death by selling poisonous berries, convicted of manslaughter, and sentenced to six months imprisonment. In another instance, a woman, for stealing a flat-iron, valued at one shilling, was sentenced to *transportation for seven years*. It is true, that she had been previously imprisoned for stealing sixpence, and also for stealing eight-pence; but was all this more deserving punishment than taking the life of a man by knowingly selling him poisoned berries?

The following cases we have taken almost at random from one of the late London papers: —

Ellen McNichol was indicted at the Middlesex sessions for stealing a flat-iron, value 1*s*., the property of Edward Mallars. Verdict, guilty. In reply to a question from the court, as to whether she had not been formerly convicted? she replied, that she "had had four months for sixpence, and nine months for eightpence;" which was found to mean, that upon being convicted, at the central criminal court, for stealing some article worth sixpence, she had been imprisoned four months, and again, upon being found guilty at the Middlesex sessions of stealing 1lb. 10oz. of meat, valued 8d., she had been sentenced to nine months' imprisonment. The learned judge said that he was perfectly certain that there must have been some very peculiar circumstances to induce such a sentence, but he could not call them to mind. The prisoner said there was nothing but what had been stated. The learned judge inquired her age. The prisoner replied that she was 39 years of age. The court sentenced her to *transportation for seven years*.

William Lyons, aged 13 years, and *William Jones*, aged 12 years, were indicted for stealing five pounds weight of lead, value one shilling, the property of William Bird. Verdict, guilty. The intelligent appearance of these two children excited the sympathy of the court. The learned judge observed that it was most extraordinary that a nation, which now boasted of its free trade, the spread of knowledge, and its public charity, should allow its criminal law, as affecting children, to remain in a state that would be disgraceful to the aborigines of New Zealand. Whatever course the court selected in dealing with convicted children must be wrong. If they were sent to prison, the general result was that, instead of making them better they became worse, and if they did not punish them at all, that would be encouraging vice. There

was a clause intended to be introduced into Parker's Prison Act, authorizing the apprenticing of these boys, and teaching them trades, but it was not persevered in, he supposed, by the advice of such inspectors as the one who told him that as soon as a child stole a penny tart he became the property of the state. The fact was, such a notion was absurd. Children must be treated as children, and any system not proceeding upon that principle was unsound. The boys were sentenced each to one month's imprisonment, at the expiration of which they were to *be soundly whipped with a birch rod.*

A man in the garb of a mechanic was placed at the bar, Guildhall, charged with having a bonnet and shawl in his possession of which he could not give a satisfactory account. Police 713 stated, that about half-past eleven o'clock last night, as he was going his rounds, he saw the prisoner standing at the corner of a street, and ordered him to move on. The witness returned shortly after, and found him still standing in the same spot, having a bundle under his arm, containing a bonnet and shawl, and some other female attire. He was asked to give an account of himself, and the only answer he would give was, "I'm old King Cole and a merry old soul." He was then questioned as to the property in his possession, but he refused to give any satisfactory account of it, and he was therefore taken into custody. *Alderman Sir W. Magnay:* Well, what account have you to give of the matter? *Prisoner:* Why, sir, I was drinking, and took away my wife's things, and locked her up before she could get any more drink; and I have now been locked up myself [laughter]. — The prisoner was discharged.

Nuisance.—It is familiar law, that a nuisance may be abated by the party whom it injures (*Penruddock's case*, 5 Rep. 101; 3 Blackst. Com. 5; *R.* v. *Boswell*, 2 Salk. 459.) This is one of the few instances in which a party is allowed to take the law into his own hands, and the limitations attached to that power are therefore most important. The late case of *Perry* v. *Fitzhowe*, (15 Law Journal, 4 B. 239,) affords the first recorded instance of an attempt to exercise that power by pulling down a house, persons being therein at the time; and we deem it on that account deserving of a short notice. The action was in trespass for breaking and entering the dwelling-house of the plaintiff in which "the plaintiff and his family, to wit, A., B. and C. &c. were, at the said several times, inhabiting and actually present," and also "while the said family of the plaintiff were in the said dwelling-house," pulling it down and destroying it. There was a second count for the expulsion of the plaintiff and his family. In his pleas the defendant justified the pulling down of the house, because it was wrongfully erected on a place over which he had a right of common. The case came before the court upon demurrer to the replication; but the question now to be noticed substantially turned upon the validity of the pleas: and that question is concisely stated in the judgment of the court to be "whether the defendant could lawfully pull down the plaintiff's dwelling-house (he and his family being in it at the time,) because it had been wrongfully erected upon a place over which the defendant had a right of common, and which right was wrongfully infringed by the erection of the house." The right to abate a nuisance was unquestionable, and no distinction could be successfully drawn between a house (no person being therein) and any other building. No express decision was to be found on the subject; but the law of distress supplied an analogy, by which the court was content to be guided. The horse on which a man is riding, or the tools which he is using, are not to be distrained, because they could only be distrained at the risk of a breach of the peace; and, on the ground that that risk would be much more imminent in the case of pulling down a house with people in it, the Court of Queen's Bench held that the law would not permit it. "The law will not permit any man to pursue his remedy at such risks, and therefore we think it unnecessary for the plaintiff to show that there was an actual breach of the peace; and the imminent risk of it is sufficiently shown by the averment in the declaration that the plaintiff was in his own house at the

time when the defendant committed the act complained of." —*Law Magazine.*

The New English Judge. — Sir William Erle, one of the justices of her majesty's court of common pleas, has been transferred to the court of King's Bench, in the room of the late Mr. Justice Williams; and Edward Vaughan Williams, Esq., has been appointed one of the justices of the common pleas, in the room of Mr. Justice Erle. Mr. Williams's appointment appears to give general satisfaction. He is a learned lawyer and the author of the work on Executors; also the editor of an edition of Saunders's Reports. When he took leave of the society of Lincoln's-Inn, the following ceremony was witnessed. At 10 o'clock there was a large assemblage of benchers, barristers, and students in the New Hall, when the expectant justice of the common pleas was introduced with great solemnity, and was thus addressed by Lord Campbell: — "Mr. Vaughan Williams, on account of the absence of the treasurer, I am unexpectedly called upon, as the senior bencher present, to address you on your taking leave of this society, with the view of your being created a judge. The task is easy and agreeable; for I have marked your career from your early youth, and I am well acquainted with your extraordinary merit. Having received a sound classical education, which ought always to be the foundation of professional eminence, you began the study of the law, and you pursued it diligently, liberally, and systematically, having before your eyes the example of your revered father, who was one of the most deeply learned common lawyers of modern times, and who, if it had pleased Providence to prolong his life, must have reached the highest professional honors. Soon after you were called to the bar, you afforded proofs of your proficiency, by giving to the world — along with an associate who was worthy to join you in such an undertaking, and who has long adorned the judgment seat (Mr. Justice Patteson) — an edition of your father's works, enriching and elucidating them with annotations of the highest value. You afterwards published a work of your own upon a very important branch of the law, most scientifically arranged, and distinguished by such accuracy that not only practitioners, but judges, are ready to appeal to it as authority. Your progress at the bar has been most creditable. Despising the arts by which some seek to force themselves into notoriety, you have only striven to qualify yourself as an advocate, and zealously and honorably to conduct the causes of the clients who have solicited your patronage. Thus you have gradually risen to be the head of your circuit, and to occupy an enviable position in Westminster-hall. For some time every man there has been of opinion that, next to himself, you were the fittest person to be raised to the bench — duly estimating your integrity, your temper, and your manners, as well as your learning and ability. On this ground you have been selected on the vacancy caused by the death of my lamented friend, Mr. Justice Williams. I have the means of knowing that the Lord Chancellor, the constitutional adviser of the Crown on such an occasion, uninfluenced by any party or personal considerations, was only solicitous to find the man who, from his accomplishments and his character, was best qualified to perform the duties of the office, and that he acted upon the maxim, *detur digniori*. I am confident, like all who hear me, that his anticipations will be fulfilled, and that hereafter you will be classed with Hale and other great judges who have reflected so much lustre on this society. I must say that we do not take leave of you with regret, since such is your destiny. I have now only, according to ancient usage, to present to you a purse containing ten guineas, as a retaining fee to plead for us during the fleeting moments that you are supposed to practise as a serjeant-at-law, and earnestly to wish that you may long, in health and happiness, enjoy the high office of a judge, to which we know you will be an ornament." The bell was then tolled, Mr. Vaughan Williams was warmly congratulated on his elevation, and the company dispersed.

To the Editor of the Law Reporter.

Capital Punishment in Louisiana. — The legislature of this state has taken, I believe, the first step towards abolishing capital punishment by the passage of a law, (approved May 29, 1846,) which reads as follows: "An act authorizing juries to qualify

their verdict in capital cases, and restricting punishment upon a qualified verdict to hard labor for life in the state penitentiary.

Section 1. Be it enacted by the senate and house of representatives of the state of Louisiana, in general assembly convened. That in all cases where the punishment denounced by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto "without capital punishment."

Section 2. Be it further enacted, &c. That whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall only be sentenced to hard labor for life, in the state penitentiary. R. M. C.

New Orleans, October 21, 1846.

To our Readers.— The article on the trial of Abner Baker, in our present number, relates to one of the most extraordinary criminal trials that ever took place in this country. It is the production of one of our ablest correspondents, a gentleman well known, as a medical jurisprudent, on both sides of the Atlantic. It was originally prepared for a scientific journal, and is reprinted here by consent of the writer.

The reports of the late slave case in New York, in the present number, have been compiled from the newspapers of that city, but we have reason to believe that they are correct.

Several articles prepared for this number are necessarily omitted for want of room.

Hotch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

Having occasion, recently, to examine the records of the selectmen of the town of Boston, in relation to the powers exercised over subjects not specifically named in the old statutes, we noticed the following votes: — "*February* 28, 1787. Mr. Hamlin, the hayward, is permitted to exchange an old bull for a young one; or to dispose of the same to the best advantage. *April* 10, 1787. Mr. Hamlin is directed to procure one more good bull, making in all, 4 bulls, the number required by the town by-laws. *May* 20, 1789. Mr. Hamlin, appeared and informed the selectmen, that one of the town bulls had this day, so gored a horse, owned by Ezra Davis, of Roxbury, as that its death was expected. *May* 2, 1789. Mr. Sever appointed to dispose of the bull which gored the horse. *June* 3, 1789. Voted that Mr. Ezra Davis of Roxbury, be paid nine pounds lawful money, for which he is to have a draft next draft day, being in full for the damage sustained by his horse being goaded by the town bull."

Wirt's Life of Patrick Henry, is excessive in its laudations of the Virginia orator. Sometime after it was published, the author was cross-examining a witness, and, in order to show his credulity, asked him if he had ever read Riley's Narrative, and if so, whether he thought it was true? "Oh yes," said the witness, "I have read it and believe every word of it." The opposing counsel then asked the witness, "did you ever read Wirt's Life of Patrick Henry?" "Yes." "Do you believe that to be true?" "No, no," was the reply, "I can't go that."

We regret to learn from the October number of the Pennsylvania Law Journal, that the editors, Messrs. Wallace and Webster, have retired from the work. In their hands the Journal has been an instructive and useful work, conducted with industry and success, and marked with uniform courtesy and good judgment. They do not intimate who their successors are to be, but state that they "are eminently qualified in every respect for the task, and possess such other advantages as will enable them to add greatly to the interest and value of the publication.

When Chief Justice Williams, of Vermont, lately declared his resolution to leave the bench of the supreme court, at the close of the term, a meeting of the Rutland county bar was held, at which resolutions were passed strongly expressive of the regret of the bar, at the determination of the learned chief justice, "to retire from a position which he has so long occupied and so highly endowed."

We have on hand a report of the trial of Ezra Canney for a capital offence. The verdict, which was murder in the second degree, reminds our correspondent of the trial in New York, for horse-stealing, when the punishment was death. Being unwilling to have a man hung for so small an offence, the jury returned a verdict of *manslaughter*.

James Newbury, Groom, aged 24, lately convicted in the central criminal court, London, of sending a letter to a member of parliament, demanding money under a threat of charging him with an abominable offence, was sentenced to transportation for twenty years.

The trustees of Franklin College, Penn., one of the oldest incorporated and endowed institutions in the country, have unanimously elected the Hon. Ellis Lewis, Professor of Law and Medical Jurisprudence.

We have received several new books which will be noticed hereafter.

Obituary Notice.

DIED, at the Norfolk House, Roxbury, on Thursday, November 26, Hon. JONATHAN P. ROGERS, a distinguished member of the Suffolk Bar, aged 45. He was a native of Augusta, Maine, and was originally a shoemaker. He commenced the study of his profession in his native town, but finished his studies in Bangor with Hill and Starrett. He was several years a partner with Ex-Governor Kent, and rapidly rose to the head of the profession in Penobscot county, where, as a lawyer, he had the highest respect of the public and the bar. When he left Bangor, a public dinner was given him by his professional brethren. A notice of the deceased, appeared in the Boston Morning Post, which we copy below.

Death of a distinguished lawyer.—Jonathan P. Rogers, Esq., one of the ablest lawyers of this commonwealth, died at the Norfolk House, Roxbury, November 26, after a painful and protracted illness, at the age of 45. He was formerly attorney-general of Maine, but, in December 1840, following the current of important legal business, he removed to this city, and entered upon the practice of his profession, his reputation for eminent abilities having preceded him through the representations of the late Judge Story and Daniel Webster, who had known him well as a practitioner in the courts of Maine. It was not long after he established himself here before he became engaged in several cases of magnitude, calculated to task the highest legal powers, and, by the skill, learning and judgment which he displayed in conducting them, he confirmed the favorable impression of his talents which had been previously entertained in the higher circles of the profession. He was particularly distinguished for the closeness and rapidity of his reasoning powers, and for the clearness of his statements, the severe simplicity of his language, and the manly dignity of his manner in presenting his views to the court or jury. In his arguments he exhibited very little, if any, of the fire of eloquence, and no man could be less disturbed by the display of that quality in an antagonist. His mode of examining a fair and intelligent witness was respectful, and at the same time thorough and effective, and, without manifesting any impatience in dealing with a stupid, or swift, or reluctant witness, he never failed to make him exhibit himself in his true light before the jury. The comprehensiveness of his mind enabled him to present the general and real merits of a case with remarkable strength and conciseness; and such was his cool tenacity of purpose, that no amount of interruption by his opponent could divert him from the course of argument which he had laid down for himself. He was prompt in turning to account the casualties which occurred in his favor in the progress of a cause, but never indulged in expressions of exultation, nor appeared embarrassed when taken by surprise by an unexpected piece of evidence adverse to his own side. By the frequent display of these great qualities as an advocate, he had began to be generally known throughout the commonwealth, when, in February last, he was taken down with the lung fever. He partially recovered from the attack, and occasionally appeared in court during the past summer, but very much enfeebled in body, and at length, though his mind seemed as strong as ever, he was compelled to withdraw from business, and confine himself to his chamber. Feeling great confidence in the natural strength of his constitution, he expressed a belief that he should recover long after his friends and family had given up all hopes. He continued to take an interest in public events up to the very last moment, as it were, and about an hour before he drew his last breath, he called for and read a newspaper. In private, Col. Rogers was much endeared to a large circle of friends, who were warmly attached to him on account of his social and generous disposition, while they cherished a profound respect for his superior mental powers, as evinced in the course of his professional career. Besides numerous intimate personal friends, he has left a wife and two children to mourn his death.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Adams, Thomas,	Boston,	Merchant,	Oct. 28,	Ellis Gray Loring.
Andrews, Parks L.	Lowell,	Trader,	Sept. 15,	J. G. Abbott.
Badger, James M.	Chelsea,	Provision Dealer,	Oct. 29,	Ellis Gray Loring.
Bird, George W.	New Bedford,	Bookseller,	" 31,	O. Prescott, J. P.
Bliss, William W.	Springfield,	Physician,	" 10,	Justice Willard.
Blood, Putnam B.	Charlestown,	Watchman,	" 5,	George W. Warren.
Bradford, George C.	Boston,	Trader,	" 23,	Bradford Sumner.
Brown, Gardner K.	Dracutt,	Yeoman,	Sept. 11,	Josiah G. Abbott.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Bullard, Cromwell et al.	Boston,	Merchant,	Oct. 13,	Bradford Sumner.
Burke, Paschal B.	Boston,	Forwarding Merch't,	" 8,	Ellis Gray Loring.
Butters, Charles B.	Springfield,	Tailor,	" 27,	E. D. Beach.
Buxton, Rufus,	Charlton,	Yeoman,	" 14,	Chas. W. Hartshorn
Chamberlain, Calvin T.	Lowell,	Stable Keeper,	Sept. 10,	J. G. Abbott,
Chesley, John H. et al.	Boston,	Provision Dealer,	Oct. 22,	Bradford Sumner.
Child, Asaph B. et al.	Boston,	Dentist,	" 16,	Bradford Sumner.
Childs, Oliver B.	Fairhaven,	Trader,	" 23,	O. Prescott, J. P.
Cumings, Allen et al.	Boston,	Plane Makers,	" 30,	Bradford Sumner.
Derry, Moses,	Wendell,	Laborer,	Sept. 21,	Rich'd E. Newcomb,
Dexter, Theodore George,	Boston,	Trader,	Oct. 3,	William Minot.
Dodge, Temple,	Salem,	Painter,	" 7,	David Roberts.
Dorr, E. M.	Boston,	Manufacturer,	" 10,	Bradford Sumner.
Downing, Frederick,	Enfield,	Machinist,	" 6,	Laban Marcy.
Drake, Thomas, Jr.	Quincy,	Blacksmith,	" 8,	S. Leland, J. P.
Dutton, William P.	Roxbury,	Baker,	" 27,	S. Leland, J. P.
Elliott, Charles E.	Roxbury,	Merchant Tailor,	" 5,	S. Leland, J. P.
Field, George,	Taunton,	Laborer,	" 7,	Horatio Pratt.
Gilman, Samuel, Jr. et al.	Boston,	Provision Dealer,	" 22,	Bradford Sumner.
Green, Cephas M.	Cambridge,	Trader,	" 20,	George W. Warren.
Hildreth, Jairus C.	Lowell,	Painter,	" 20,	George W. Warren.
Holmes, Zacheus,	Wareham,	Yeoman,	Aug. 17,	Z. Eddy.
Hovey, Henry A.	Boston,	Coach & Carr'e Man.	Oct. 20,	Bradford Sumner.
Howe, Elijah, Jr.	Springfield,	Machinist,	" 20,	E D. Beach.
Howe, Francis D.	Malden,	Cordwainer,	" 26,	George W. Warren.
Hoyt, Adam,	Boston,	Trader,	" 29,	Bradford Sumner.
Huckins, Abram W.	Boston,	Housewright,	" 21,	George S. Hillard.
Jewett, George,	Rowley,	Tanner & Currier,	" 16,	John G. King
Jones, Owen,	Salem,	Shoe Manufacturer,	" 5,	David Roberts.
Kegan, Patrick,	Boston,	Merchant,	" 23,	Ellis Gray Loring.
Kimball, George,	Boston,	Clerk,	" 13,	Ellis Gray Loring.
Kingman, Charles B.	Boston,	Bookbinder,	" 2,	Bradford Sumner.
Legay, John B.	Boston,	Hatter,	" 27,	Bradford Sumner.
Leland, Ezra,	Mendon,	Boot Manufacturer,	" 1,	Henry Chapin.
Lincoln, Marvin,	Springfield,	Carpenter,	" 9,	E. D. Beach.
Livermore, Elijah,	Boston,	Trader,	" 24,	Bradford Sumner.
Loud, Albert B. et al.	Boston,	Trader,	" 22,	George S. Hillard.
McAnally, Patrick,	Fall River,	Laborer,	" 30,	C. J. Holmes.
Moore, William,	Springfield,	Crockery Ware Mer.	" 1,	Justice Willard.
Murdock, Warren,	Wareham,	Manufacturer,	Sept. 7,	Z. Eddy.
Olmsbee, Caleb L.	Fairhaven,	Baker,	Oct. 26,	O. Prescott, J. P.
Page, John C.	Danvers,	Brickmaker,	Sept. 7,	John G. King.
Palmer, Edwin A.	Boston,	Trader,	" 8,	William Minot.
Paul, Theodore,	Middelborough,	Yeoman,	" 19,	Z. Eddy.
Peirce, Charles,	Charlestown,	Mason,	Oct. 23,	Bradford Sumner.
Pond, Abner A.	Leicester,	Merchant,	Sept. 5,	Isaac Davis.
Pope, Isaiah P. et al.	Fall River,	Trader,	" 25,	C. J. Holmes.
Preston, Sumner,	South Hadley,	Carpenter & Joiner,	Oct. 23,	C. P. Huntington.
Quimby, Philip, Jr.	Haverhill,	Housewright,	" 29,	James H. Duncan.
Quinn, George W.	Worcester,	Carpenter,	" 30,	Chas. W. Hartshorn.
Ray, Augustus J.	Lee,	Yeoman,	" 10,	William P. Walker.
Read, Marcus et al.	Boston,	Planemaker,	" 30,	Bradford Sumner.
Reed, Henry M.	Boston,	Painter,	" 5,	George S. Hillard.
Rennington, Thomas,	New Bedford,	Carpenter,	" 16,	Oliver Prescott, J. P.
Richardson, Josiah,	Worcester,	Beermaker,	" 15,	Chas. W. Hartshorn.
Richardson, James,	Boston,	Confectioner,	" 13,	Ellis Gray Loring.
Richards, Asa T. et al.	Charlestown,	Merchant,	" 13,	Bradford Sumner.
Rogers, Isaiah,	Marshfield,	Architect,	" 8,	Bradford Sumner.
Rollins, Eliphalet M.	Methuen,	Housewright,	" 30,	James H. Duncan.
Sawtell, Homer,	Worcester,	Carpenter,	" 13,	Isaac Davis.
Small, Samuel,	New Bedford,	Trader,	" 16,	O. Prescott, J. P.
Soule, Andrew J.	Boston,	Carpenter,	" 8,	Bradford Sumner.
Stearns, Oliver,	Boston,	Manufacturers,	" 8,	Bradford Sumner.
Stiles, Hosea B.	Roxbury,	Yeoman,	" 27,	S. Leland, J. P.
Stone, Elisha et al.	Boston,	Merchant.	" 13,	Bradford Sumner.
Suele, William,	Lowell,	Carpenter,	Sept. 29,	J. G. Abbott, J. P.
Squires, Horace,	Shutesbury,	Laborer,	" 25,	Rich'd E. Newcomb.
Sullivan, John O.	Worcester,	Trader,	Oct. 17,	Isaac Davis.
Thayer, Hiram,	Roxbury,	Carpenter,	" 31,	D. A. Simmons.
Thompson, John,	Boston,	Stable Keeper,	" 17,	Bradford Sumner.
Tufts, Francis, Jr.	Boston,	Laborer,	" 7,	George S. Hillard.
Washburn, Eliab,	Belchertown,	Laborer,	" 9,	Mark Doolittle.
Waterman, James H.	Boston,	Bookbinder,	" 17,	Bradford Sumner.
Weller, W. Solomon,	Westport,	Laborer,	" 16,	O. Prescott, J. P.
Williams, Robert J.	Boston,	Housewright,	" 2,	Bradford Sumner.
Whitney, Alvin,	Lowell,	Painter,	" 27,	Bradford Russell.
White, Adoniram J.	Sutton,	Cordwainer,	" 27,	Isaac Davis.
Whipple, Amariah B.	Boston,	Provision Dealer,	" 19,	Bradford Sumner.
Wyman, Henry,	Chelsea,	Piano Forte Maker,	" 2,	William Minot.